Supreme Court, U.S.
FILED

No. 011810 JUN 13 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 2001

THOMAS E. JOHNSON
Petitioner

v.

LAWSON & LAWSON TOWING COMPANY, INC.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Louis R. Koerner, Jr.
Koerner Law Office
1204 Jackson Avenue
New Orleans, LA 70130-5130
Phone (504)581-9569

Of Counsel:
Kenneth W. Jacques, #7214
203 Carondelet Street
Suite 355, Maritime Bldg.
New Orleans, Louisiana 70130
Telephone: (504) 524-1954

June 6, 2002

90 pg

QUESTIONS PRESENTED

By its local rule permitting dismissal of an appeal without notice or warning for failure to timely file the brief and record excerpts and its not ordering *ipso facto* reinstatement of the appeal by the timely filing thereafter of the brief and record excerpts, did the court of appeal act in contravention of Federal Rule of Civil Procedure 31(c) and the local rules, *inter alia,* of the Third, Fourth, and Eight. Circuits and establish a conflict with the decisions of the courts of appeal in *Matute v. Procoast Navigation Ltd.*, 928 F.2d 627, 630-31 (3d Cir. 1991); *U.S. v. Kush*, 579 F.2d 394 (6th Cir. 1978), *Harmon v. Swaggert*, 754 F.2d 374 (6th Cir. 1984); *In the Matter of: Bluestein & Company*, 68 F.3d 1022 (7th Cir. 1995); *In re Beverly Manufacturing Corporation*, 778 F.2d 666. 667-68 (11th Cir. 1985); and *McCray v. Department of Veterans Affairs*, 230 F.3d 1381 (Federal Cir. 2000); and the decision of this Court in *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 468, 120 S. Ct. 1579, 1585; 146 L. Ed. 2d 530 (2000)?

Did the court of appeal by its denial of reinstatement of the appeal upon the showing made by petitioner of petitioner's lack of knowledge and involvement in the failure of his counsel to timely file the brief and record excerpts and of his counsel's excusable neglect establish a conflict with the decisions of the courts of appeal in *Raymond v. International Business Machines Corp.*, 148 F.3d 63. 66 (1st Cir. 1998); *In Re: Cendant Corporation Prides Litigation*, 235 F.3d 176, 183-84 (3d Cir. 2000 (trivial delay in filing proof of claim); *In Re: Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315, 323-329 (3d Cir. 2001), *Robb v. Norfolk & Western Railway Company*, 122 F.3d 354, 359-62 (7th Cir. 1997); *Johnson v. Dayton Electric Manufacturing Co.*, 140 F.3d 781 (8th Cir. 1998); *In re: Jones Truck Lines, Inc.*, 63 F.3d 685 (8th Cir. 1995); *In re: Sheehan*, 253 F.3d 507 (9th Cir. 2001); *TCI Group Life Insurance Plan v. Knoebber*, 244 F.3d 691, 696-699 (9th Cir. 2001); *Bateman v.*

USPS, 231 F.3d 1220, 1225 (9th Cir. 2001) and *Walter v. Blue Cross & Blue Shield United of Wisconsin*, 181 F.3d 1198, 1202 (11th Cir. 1999), and the decision of this Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380; 113 S. Ct. 1489; 123 L. Ed. 2d 74 (1993)?

By its failure to consider the merits of the brief and record excerpts filed on November 26, 2001 and less than two weeks after dismissal, does the court of appeal establishes a conflict with the decision of the court of appeal in *Everts v. TRW, Inc.*, 588 F.2d 830 (6th Cir. 1978)?

PARTIES TO THIS PROCEEDING

Petitioner is Thomas Johnson, plaintiff in the district court and appellant in the court of appeal.

Respondent is Lawson & Lawson Towing Company, Inc,, a defendant in the district court and an appellee in the court of appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THIS PROCEEDING	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
TABLE OF APPENDICES	vi
OPINIONS BELOW	1
GROUNDS FOR JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	4
A DISCUSSION OF THE FAILURE TO TIMELY FILE	6
REASONS FOR GRANTING THE WRIT	8
A. Lack of Notice and Failure to Reinstate upon Full Compliance within Fourteen Days	8
B. Was the Showing of Excusable Neglect, Lack of Involvement of the Plaintiff, and Lack of Prejudice Such that Denial of Reinstatement Establishes a Conflict with the Decisions of Other Circuits and This Court?	11
C. Where the Default Was Confirmed Prior to Consideration of the Motion for Reinstatement, the Court of Appeal Should Have Considered the Merits of the Appeal	13
CONCLUSION	13

TABLE OF AUTHORITIES

STATUTES:

28 U.S.C. 1254(1), 2101(c)	1
Federal Rule of Appellate Procedure 31(c)	1
USCS Ct App 3rd Cir, LAR Misc 107.0 (2002)	1
USCS Ct App 4th Cir, Local R 45 (2002)	2
Fifth Circuit Local Rule 27.1.6	9
Fifth Circuit Local Rule 42.3 Dismissal for Failure to Prosecute.	3
USCS Ct App 8th Cir, Appx Local R 8001A (2002)	4

CASES:

Bateman v. USPS, 231 F.3d 1220, 1225 (9th Cir. 2001)	12
Everts v. TRW, Inc., 588 F.2d 830 (6th Cir. 1978)	13
Harmon v. Swaggert, 754 F.2d 374 (6th Cir. 1984)	11
In re Beverly Manufacturing Corporation, 778 F.2d 666. 667-68 (11th Cir. 1985)	10
In Re: Cendant Corporation Prides Litigation, 235 F.3d 176, 183-84 (3d Cir. 2000	11
In re: Jones Truck Lines, Inc., 63 F.3d 685 (8th Cir. 1995)	12
In Re: Orthopedic Bone Screw Products Liability Litigation, 246 F.3d 315, 323-329 (3d Cir. 2001)	11
In re: Sheehan, 253 F.3d 507 (9th Cir. 2001)	12

In the Matter of: Bluestein & Company, 68 F.3d 1022 (7th Cir. 1995) 12

Johnson v. Dayton Electric Manufacturing Co., 140 F.3d 781 (8th Cir. 1998) 12

Matute v. Procoast Navigation Ltd., 928 F.2d 627, 630-31 (3d Cir. 1991) 10

McCray v. Department of Veterans Affairs, 230 F.3d 1381 (Federal Cir. 2000) 10

Nelson v. Adams, USA, Inc., 529 U.S. 460, 468, 120 S. Ct. 1579, 1585; 146 L. Ed. 2d 530 (2000) 11

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380; 113 S. Ct. 1489; 123 L. Ed. 2d 74 (1993) 11

Raymond v. International Business Machines Corp., 148 F.3d 63. 66 (1st Cir. 1998) 11

Robb v. Norfolk & Western Railway Company, 122 F.3d 354, 359-62 (7th Cir. 1997) 12

TCI Group Life Insurance Plan v. Knoebber, 244 F.3d 691, 696-699 (9th Cir. 2001) 12

U.S. v. Kush, 579 F.2d 394 (6th Cir. 1978) 10

Walter v. Blue Cross & Blue Shield United of Wisconsin, 181 F.3d 1198, 1202 (11th Cir. 1999) 12

TABLE OF APPENDICES

Appendix A – Order of the Court of Appeal for the Fifth Circuit of November 14, 2001 dismissing the appeal for lack of prosecution. 1a

Appendix B – Order of the Court of Appeal for the Fifth Circuit of December 19, 2001 denying reinstatement. 2a

Appendix C – Order of the Court of Appeal for the Fifth Circuit of February 13, 2002 denying the petition for panel rehearing. 3a

Appendix D – Order of the Court of Appeal for the Fifth Circuit of March 15, 2002 denying the petition for en banc rehearing. 4a

Appendix E -- Opinion and order of the United States District Court, dated July 12, 2001 and entered on July 13, 2001 denying the motion to continue the motion for summary judgment reported at 2001 U.S. Dist. LEXIS 10414 (E.D. La. 2001) 6a

Appendix F -- Opinion and Order of the United States District Court, dated July 17, 2001 and entered on July 18, 200[illegible] granting summary judgment in favor of defendants, reported at ., 2001 U.S. Dist. LEXIS 10483 (EDLA 2001) 9a

Appendix G -- Opinion and order of the United States District Court, dated September 14, 2002 denying the motion of plaintiff for reconsideration, reported at 2001 U.S. Dist. LEXIS 14607 (E.D. La. 2001) 15a

Appendix H – The original brief of Thomas Johnson, plaintiff and appellant filed on November 26, 2001 20a

Appendix I – The affidavit of Louis R. Koerner, Jr. filed on December 31, 2001 64a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The orders of the Fifth Circuit Court of Appeals dismissing the appeal and refusing to reinstate it appear at appendices A-E and are not reported. The district court opinions appear at appendices F, G, and H and are reported at 2001 U.S. Dist. LEXIS 10414 (E.D. La. 2001), 2001 U.S. Dist. LEXIS 10483 (EDLA 2001) and 2001 U.S. Dist. LEXIS 14607 (E.D. La. 2001).

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decisions below on November 14, 2001 and December 19, 2001. Rehearing was denied on February 19, 2002. Rehearing en banc was denied on March 15, 2002.

STATUTES INVOLVED

Federal Rule of Appellate Procedure Rule 31(c) reads as follows:

(c) ***Consequence of Failure to File.*** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

USCS Ct App 3rd Cir, LAR Misc 107.0 (2002)

107.2 Dismissal for Failure To Prosecute

(a) When an appellant fails to comply with the Federal Rules of Appellate Procedure or the Local Appellate Rules of this court, the clerk shall issue written notice to counsel or to the appellant who appears pro se that upon the expiration of fourteen (14) days

from the date of the notice, the appeal may be dismissed for want of prosecution unless appellant remedies the deficiency within that time. If the deficiency is not remedied within this period, the clerk is authorized to dismiss the appeal for want of prosecution and issue a certified copy thereof to the clerk of the district court as the mandate. The appellant shall not be entitled to remedy the deficiency after the appeal is dismissed except by order of the court. A motion to set aside such an order must be justified by the showing of good cause and may not be filed after ten (10) days of the date of dismissal. If the appeal is one taken from the District Court of the Virgin Islands, an additional ten (10) days shall be added to the time limits specified in this paragraph.

(b) Notwithstanding subsection (a), if an appellant fails to comply with the Federal Rules of Appellate Procedure and the Local Appellate Rules with respect to the timely filing of a brief and appendix, at any time after the seventh day following the due date, the clerk is authorized to dismiss the appeal for want of timely prosecution. The procedure to be followed in requesting an order to set aside dismissal of the appeal is the same as that set forth in subsection (a).

USCS Ct App 4th Cir, Local R 45 (2002)

Local Rule 45. Dismissals for Failure to Prosecute

When an appellant in either a docketed or non-docketed appeal fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant or, if appellant is represented by counsel, appellant's counsel that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. Should the appellant fail to comply within said 15-day period, the clerk shall then enter an order dismissing said appeal for want of prosecution, and shall issue a certified copy thereof to the clerk of the district court as and for the mandate. In no case shall the

appellant be entitled to reinstate the case and remedy the default after the same shall have been dismissed under this rule, unless by order of this Court for good cause shown. The dismissal of an appeal shall not limit the authority of this Court, in an appropriate case, to take disciplinary action against defaulting counsel.

Fifth Circuit Local Rule 42.3 Dismissal for Failure to Prosecute.

42.3.1 In direct criminal appeals proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 and 42.3.1.2 apply. In habeas cases, actions filed under 28 U.S.C. § 2255, and other prisoner matters proceeding in forma pauperis, the provisions of 5th Cir. R.42.3.1.1 apply if the appellant is represented by counsel; prisoners proceeding pro se will be given an initial written deadline for filing a certificate of appealability, filing any briefs, for paying fees, or for complying with other directives of the court. If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal without further notice, 15 days after the deadline date.

42.3.1.1 Appeals with Counsel. If appellant is represented by appointed or retained counsel, the clerk shall issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge.

42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal.

42.3.2 In all other appeals when appellant fails to order the transcript, fails to file a brief, or otherwise fails to comply with the rules of the court, the clerk must dismiss the appeal for want of prosecution.

42.3.3 In all instances of failure to prosecute an appeal to hearing as required, the court may take such other action as it deems appropriate.

42.3.4 An order dismissing an appeal for want of prosecution must be issued to the clerk of the district court as the mandate.

USCS Ct App 8th Cir, Appx Local R 8001A (2002)

(c) Dismissal. If an appellant fails to comply with Part VIII of the Federal Rules of Bankruptcy Procedure or these Rules, the clerk shall notify the appellant that the appeal will be dismissed for want of prosecution unless appellant remedies the default within ten (10) days after the clerk issues the notice. If an appellant fails to comply within the ten (10) day period, the clerk shall enter an order dismissing the appeal for want of prosecution and shall issue a certified copy of the order as the mandate to the clerk of the bankruptcy court from which the appeal originated. After the appeal has been dismissed under this Rule, there is no remedy for default except by order of the court. The dismissal of an appeal shall not limit the court's authority to take disciplinary action against defaulting parties or counsel in appropriate cases.

STATEMENT OF THE CASE

The complaint herein was filed on March 1, 2000. Answer was filed on June 14, 2000. The deposition of plaintiff was taken on September 9, 2000. Trial on the merits was initially set for

May 14, 2001, but was reset on account of a schedule conflict of Louis R. Koerner, Jr., liability counsel for plaintiff who made an appearance on January 30, 2001 and moved for a continuance which was granted on February 16, 2001. The depositions of Vance Lawson and Captain Cavitt were taken on April 24, 2001. The long-delayed vessel inspection was had on May 4, 2001. Plaintiff's counsel was out of the country from May 7-13, which was the reason for the continuance of the initial trial setting. The motion for summary judgment was filed by defendant on June 5, 2001 and set on June 20, 2001, when it was known that plaintiff's counsel would be out of the country from May 30-June 30, 2001. Even after the continuance, it was necessary that the opposition to the continued motion for summary judgment be filed by July 5, 2001, less than a week after his return.

Plaintiff also filed a motion to compel discovery and alternatively for the imposition of sanctions, including preclusion of witnesses, as well as a motion to defer the motion for summary judgment until completion of discovery. This was denied on July 12, 2001 (Dkt-41, R-471, RE-20-22).

The motion for summary judgment was granted on July 17, 2001 (Dkt-44, R-454, RE-23-30), but final judgment was not filed until August 1, 2001 and entered on August 2, 2001 (Dkt-51, R-323, RE-11).

Prior to the entry of final judgment, plaintiff, on July 27, 2001, filed a motion for reconsideration and to permit depositions of Ernie Hunt and Dr. Greg Ungerank, D.C. (Dkt-50, R-325)

The motion for reconsideration was denied with written reasons on September 14, 2001 (Dkt-55, R-264, RE-31-37). The timely notice of appeal (Dkt. 56, R-261, RE-9-10) was filed on September 18, 2001.

The briefing notice was dated September 26, 2001, less than two weeks after the denial of reconsideration and the filing of the notice of appeal. According to that notice, the brief and record

excerpts were due on November 5, 2001. When none were received, the motion was dismissed on November 14, 2001, for failure to file record excerpts and briefs, citing Fifth Circuit Rule 42.3. Appellee filed no motion under FRAP 31(c).

On November 26, 2001, the briefs and record excerpts were filed together with a motion to file the same out of time and to reinstate the appeal. This Court's docket sheet entry of November 26, 2001 indicates that the default was remedied. On December 5, 2001, an opposition was filed by the appellee to the motion to reinstate, which did not state that there had been any prejudice to appellee, and only urged that there had been "lack of good cause," an inappropriate standard.

The motion was decided and denied by a single judge of this Court without comment or reasons on December 19, 2001, which denial was received on December 20, 2001. The motion for reconsideration was denied by a panel of this Court on February 13, 2002, also without comment or reasons. The petition for en banc reconsideration was denied without reasons on March 15, 2002.

A DISCUSSION OF THE FAILURE TO TIMELY FILE

As may be seen from the affidavit reproduced in Appendix I, 64a, counsel for petitioner has had serious problems with his eyesight that interfered with his ability to properly read the briefing notice and to catch the failure of his temporary staff person to properly understand the import of the briefing notice. The first notice that a brief was due or had not been timely filed was on November 15, 2001, when the dismissal of the appeal was filed and on November 16, 2001, when it was received.

Upon his return from his summer vacation, counsel for petitioner found that his eyesight had so materially deteriorated on account of previously diagnosed cataracts in each eye that it made preparing the opposition to the motion for summary judgment in the district court difficult and challenging and

prevented him, within the next several weeks, from being able to drive any distance (Aff. 5, 65a).

After his first successful cataract surgery, on August 27, 2001 on his right eye, and the distance vision in that eye began to improve, counsel still had great difficulty in reading either with that eye or with his left eye, and therefore delegated most of the reading duties in his office to his staff (Aff. 7, 65a).

After his second successful cataract surgery, on his left eye, on October 22, 2001, reading for counsel continued to be difficult until some time in November when his reading eyesight returned to normal (Aff. 8, 65a).

At the time that the appearance form and docketing form were received but not properly noted or calendared (see Incoming Mail Lists for September 27-28, 2001 that were attached to the original motion for reinstatement), counsel's reading vision was markedly blurred, and he was unable to read well and only with great difficulty and with many mistakes. He did not see the briefing notice as it came in, and it was not otherwise brought to his attention by his staff, because the normal person who handled calendar matters was undergoing therapy on account of an automobile accident (Aff. 9-10, 66a).

In addition, counsel had received (10/12/01) and signed up (10/13/01) for the Fifth Circuit's Event Notification System, and expected to receive his briefing notice in the captioned case electronically, but none was so received. On account of the use of a large monitor and the nature of the sight required, counsel could read his computer monitor better than he could see printed material (Aff. 10-11, 67a). Moreover, the record on appeal was released to counsel for mover on October 23, 2001 and after he had signed up for electronic notification of briefing notices, but without such a notice having been received.

Due to counsel's pending cataract surgery, the initial preparation of the brief was immediately assigned to Genvienve

Jacques, a recent graduate of Loyola Law School, after the record was received. Unfortunately, she did not discover that the briefing notice had already been issued, and left within counsel's employee within two weeks with no work done on the brief in this case.

The failure to timely act in this case is without precedent. In the more than thirty years during which counsel for petition has been a member of the Bar of the Fifth Circuit Court of Appeal and of this Court and as to the scores of briefs that have been filed, there has never been a single situation in which he has filed a brief late as an appellant and there has never been a case in which an appeal has been dismissed, even temporarily, for failing to timely file a brief. Moreover, there was never any prior problem in this case with failure to file any pleading within the deadlines established or extended by the district court or any sanction or admonition to petitioner or his counsel.

The appellant in the Fifth Circuit and petitioner here, Thomas Johnson, was not responsible in any way for the calendaring error in the office of his counsel.

REASONS FOR GRANTING THE WRIT

The Decision and Local Rules of the Fifth Circuit Court of Appeals, on an important issue, conflict with decisions of this court and with the local rules and decisions of other Circuits.

A. Lack of Notice and Failure to Reinstate upon Full Compliance within Fourteen Days

As mandated by its local rule, the Clerk of the Fifth Circuit dismissed the appeal. Although full compliance was made within fourteen days, the motion for reinstatement was not ipso facto granted, rather the motion for reinstatement was denied by Circuit Judge Emilio Garza, then acting alone, but who later acted for the panel in the motion for reinstatement. See Appendices B-D. There were no reasons provided.

There is no provision of the Federal Rules of Civil Procedure to permit dismissal of an appeal for lack of prosecution without a motion from the appellee. See Fed. R. App. P. 31(3). Although 5th Cir. R. 42.3.2-4 mandate dismissal and issuance of the mandate as part of the dismissal, other portions of 5th Cir. R. 42.3 require issuance of a fifteen-day notice and provide for sanctions against counsel when the additional notice is disregarded. Moreover, 5th Cir. R. 27.1.2 and 27.1.6, and I.O.P. "Reinstatement of cases dismissed by the Clerk."[1] suggest that reinstatement is usually granted by the clerk of that court when there has been, as here, a full and complete cure of the default.

These Fifth Circuit local rules also conflict with the provisions of the local rules of other circuits which require notice to counsel for the appellant that the appeal will be dismissed unless the dereliction has been remedied within a short period such as 10 or 14 days. See USCS Ct App 3rd Cir, LAR Misc 107.0 (2002), USCS Ct App 4th Cir, Local R 45 (2002), and USCS Ct App 8th Cir, Appx Local R 8001A (2002)

The courts of appeal and this Court have always protected innocent litigants against the consequences of minor mistakes of their counsel when there is no clear proof of serious misconduct and no prejudice to other parties, as is the case here.

The Seventh Circuit held, *In the Matter of: Bluestein & Company*, 68 F.3d 1022, 1026 (7th Cir. 1995), that, except in the most egregious of circumstances, "due warning" of immanent dismissal should be given to the attorney, so that "dismissals

---

[1] **Reinstatement of cases dismissed by the clerk.** The court normally will not reinstate a case dismissed by the clerk under 5th Cir. R. 27.1.6 unless: The deficiency which caused the dismissal has been remedied; and the motion for reinstatement is made as soon as reasonably possible and in any event within 45 days of dismissal.

without warning are appropriate in only the most extreme cases, where it is clear that counsel must have expected his actions (or inaction) to be answered with dismissal."

Other circuits make similar analyses, and permit reinstatement in proper cases. In *Matute v. Procoast Navigation Ltd.*, 928 F.2d 627, 630-31 (3d Cir. 1991), where there were repeated requests for extension of time and then a failure to file the brief until some two months later, the motion to file the brief out of time was denied, but on rehearing, the court considered compelling personal circumstances, reinstated the appeal, and rendered a decision on the merits. In *McCray v. Department of Veterans Affairs*, 230 F.3d 1381 (Federal Cir. 2000), the court reinstated the appeal on the basis of counsel's "inadvertence and excusable negligence" and his statement that the appellee was not prejudiced by the delay in the submission of the brief for the appellant. In both cases, the court made a decision that considered the merits of the appeal, since the brief was available.

Compare *In re Beverly Manufacturing Corporation*, 778 F.2d 666. 667-68 (11th Cir. 1985):

> Filing briefs, however, is not a jurisdictional pre-requisite, nor does it prejudice the parties and the court to a similar degree. See, *Marcaida, supra.* Thus, the more flexible standard requiring bad faith, negligence or indifference is appropriate with regard to filing briefs. We vacate the dismissal below and remand this case to the district court for a determination of whether appellant's claims regarding length of delay in processing and lack of notice are supportable and therefore excuse his failure to file.

In *U.S. v. Kush*, 579 F.2d 394 (6th Cir. 1978), the dismissal was to be deemed vacated if, as here, the default was cured within twenty-one days (See 5th Cir. R. 42.3.1.1 for a similar provision), and final dismissal was only entered when there was still a complete lack of compliance with the appendix requirement. See

Harmon v. Swaggert, 754 F.2d 374 (6th Cir. 1984) (refusal to dismiss appeal in the absence of a showing of prejudice.)

The actions of the court below also conflict with the decision of this Court in *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 468, 120 S. Ct. 1579, 1585; 146 L. Ed. 2d 530 (2000).

B. Was the Showing of Excusable Neglect, Lack of Involvement of the Plaintiff, and Lack of Prejudice Such that Denial of Reinstatement Establishes a Conflict with the Decisions of Other Circuits and This Court?

The actions of counsel for Johnson also constitute excusable neglect (promptly remedied upon notice) that should, under this same analysis, have been sufficient to require the court of appeal to reinstate the appeal, since the docket sheet reflects that the default had been corrected.

The leading case on excusable neglect is *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380; 113 S. Ct. 1489; 123 L. Ed. 2d 74 (1993). The test to be applied considers good faith (not at issue here), prejudice (absent here), length of delay (brief and cured almost immediately), reason for delay (not attributable to Johnson and explainable by his counsel's eyesight problems and the confusion concerning electronic notification), and equity (since the problem was promptly cured and there is no prejudice).

Other circuits have applied similar analyses. Please see, *Raymond v. International Business Machines Corp.*, 148 F.3d 63. 66 (1st Cir. 1998) (jury demand filed out of time); *In Re: Cendant Corporation Prides Litigation*, 235 F.3d 176, 183-84 (3d Cir. 2000 (trivial delay in filing proof of claim).

The Third Circuit reversed the refusal of the district court to permit a late-filed claim in *In Re: Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315, 323-329 (3d Cir. 2001), stating at *id.*, 329, that the district court:

> did not perform a balancing of the equitable factors of excusable neglect in determining Sambolin's exclusion from the settlement class, and because none of the equitable factors support the District Court's result, we conclude that its holding was necessarily in error.

In *Robb v. Norfolk & Western Railway Company*, 122 F.3d 354, 359-62 (7th Cir. 1997), the plaintiff/appellant was protected against the consequences of his attorney's missing a deadline in filing an opposition to a motion for summary judgment by an application of the principle of "excusable neglect" to protect the innocent client. The court of appeal specifically permitted the district court to consider the attorney's good track record, as was suggested here, in deciding whether to give the requested relief. *Id.* at 362.

Johnson v. Dayton Electric Manufacturing Co., 140 F.3d 781 (8th Cir. 1998) reversed the district court's refusal to upset a default judgment, making an analysis of the merits and blameworthiness, and finding that the district court had abused its discretion in not finding "excusable neglect." Compare *In re: Jones Truck Lines, Inc.*, 63 F.3d 685 (8th Cir. 1995) (reversal of a denial of a motion to set aside a default). See *In re: Sheehan*, 253 F.3d 507 (9th Cir. 2001) (motion to dismiss because of service outside of the 120 day period) and *TCI Group Life Insurance Plan v. Knoebber*, 244 F.3d 691, 696-699 (9th Cir. 2001) (reversing refusal to set aside a default, emphasizing a culpability test); *Bateman v. USPS*, 231 F.3d 1220, 1225 (9th Cir. 2001) (reversing failure to set aside summary judgment for lack of an answer, even though, "The reason for the delay is, admittedly, weak.")

In *Walter v. Blue Cross & Blue Shield United of Wisconsin*, 181 F.3d 1198, 1202 (11th Cir. 1999), a party was relieved, on appeal, from the consequences of a miscalendaring that is very similar to the situation in the present case:

> *Pioneer* and *Cheney* directly control the outcome of this case, and all four factors weigh in favor of Walter's position. First, in its memorandum opposing Walter's motion to set aside the dismissal, Blue Cross of Wisconsin admitted that it had not suffered any prejudice from Walter's delay. Second, although the delay of one month in this case n3 is longer than the delay in *Cheney*, there is no reason to believe allowing Walter to file the untimely response would have had an adverse impact on the district court or its resources. Third, the reason for the delay was the failure of a former secretary of Walter's attorney to record the applicable deadline--the type of "innocent oversight" involved in *Cheney*. See *Cheney*, 71 F.3d at 850; see also *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 999 (11th Cir.1997) (miscommunication or clerical error constitutes excusable neglect; attorney's failure to understand plain language of a rule does not). Finally, Blue Cross concedes that Walter did not act in bad faith.

C. Where the Default Was Confirmed Prior to Consideration of the Motion for Reinstatement, the Court of Appeal Should Have Considered the Merits of the Appeal

By its failure to consider the merits of the brief and record excerpts filed on November 26, 2001 and less than two weeks after dismissal, the court of appeal established a conflict with the decisions of the court of appeal in *Everts v. TRW, Inc.*, 588 F.2d 830 (6th Cir. 1978) (consideration of the merits rather then simply a dismissal of the appeal).

CONCLUSION

The automatic and mandated dismissal of the appeal without notice or automatic reinstatement upon timely compliance and without any motion to dismiss being filed by the appellee is unfair and establishes a conflict among the circuits and with the

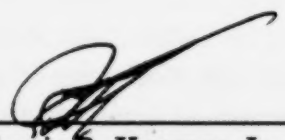
decisions of this Court that should be addressed by this Court's vacation of the dismissal or issuance of an order of reinstatement.

Although without written reasons it is impossible to determine the actual reason for the denial of reinstatement of the appeal, it appears that the denial of the motion to reinstate was based on a misperception of a requirement of good cause, whereas the lesser standard of excusable neglect should have been applicable to failure of counsel to meet court-ordered deadlines. Here both the plaintiff and his counsel are in good faith, there was an absence of prejudice, there was but a brief delay that, as here, was a consequence of factors such as a temporary worker's mistake and counsel's eyesight problems, and there was may have been some confusion, such as over a new electronic notification system established by the court of appeal.

Under any circumstances, reinstatement should not be denied unless there has been a determination, by a review of the merits of the brief and record excerpts when filed, that the appeal lacks facial merit, which the appeal in this case does not.

For all these reasons, Petitioner requests that this Court grant his Petition for Certiorari.

KOERNER LAW FIRM

By: 

Louis R. Koerner, Jr.
Louisiana Bar 7817
1204 Jackson Avenue
New Orleans, Louisiana 70130-5130
Telephone: (504) 581-9569
Telecopier: (504) 566-0546
email: louis@koerner-law.com
URL: http://www.koerner-law.com

LAW OFFICES OF KENNETH W. JACQUES
A PROFESSIONAL LAW CORPORATION
Kenneth W. Jacques, #7214 T.A.
203 Carondelet Street
Suite 355, Maritime Bldg.
New Orleans, Louisiana 70130
Telephone: (504) 524-1954

APPENDIX A – ORDER OF THE COURT OF APPEAL OF NOVEMBER 14, 2001 DISMISSING THE APPEAL FOR LACK OF PROSECUTION

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
NO. 01-31122

NOV 14 2002
CHARLES R. FULBRUGE III
CLERK
U. S. COURT OF APPEAL
THOMAS E. JOHNSON
Plaintiff-Appellant

VERSUS

LAWSON & LAWSON TOWING COMPANY, INC.
Defendants-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana,

CLERK'S OFFICE:
Under 5TH CIR.R. 42.3, the appeal is dismissed as of November 14, 2001, for want of prosecution. The appellant failed to timely file brief and record excerpts.

CHARLES R. FULBRUGE III
Clerk of the United States Court of Appeals for the Fifth Circuit
By: Monica Washington, Deputy Clerk
FOR THE COURT – BY CIRECTION

APPENDIX B – ORDER OF THE COURT OF APPEAL OF DECEMBER 19, 2001 DENYING REINSTATEMENT

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
NO. 01-31122

U. S. COURT OF APPEALS
FILED DEC 19 2001
CHARLES R. FULLRUGE III
CLERK

THOMAS E. JOHNSON
Plaintiff-Appellant

VERSUS

LAWSON & LAWSON TOWING COMPANY, INC.
Defendants-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ORDER:

IT IS ORDERED that the motion of appellant to reinstate the appeal is denied.

Emelio M. Garza
United States Circuit Judge

APPENDIX C – ORDER OF THE COURT OF APPEAL OF FEBRUARY 13, 2002 DENYING THE PETITION FOR PANEL REHEARING

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 01-31122

FEB 13 2002

CHARLES R. FULBRUGE ;1i

CLERK

U. S. COURT OF APPEAL

THOMAS E. JOHNSON

Plaintiff-Appellant

VERSUS

LAWSON & LAWSON TOWING COMPANY, INC.

Defendants-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant for reconsideration of the Court's order of December 19, 2001, is denied.

APPENDIX D – ORDER OF THE COURT OF APPEAL OF MARCH 15, 2002 DENYING THE PETITION FOR EN BANC REHEARING

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 01-31122

U. S. COURT OF APPEALS
FILED MAR 15 2002
CHARLES R. FULLRUGE III
CLERK

THOMAS E. JOHNSON
Plaintiff-Appellant

VERSUS

LAWSON & LAWSON TOWING COMPANY, INC.
Defendants-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON MOTION FOR EN BANC RECONSIDERATION

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(V) No member of the panel nor judge in regular active service of the court having requested that the court be polled on reconsideration en banc (FED. R. APP. P.and STH CIR. R.35) , the motion for reconsideration of the Court's order of February 13, 2002, is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R.35) , the motion for reconsideration of the Court's order of February 13, 2002 is DENIED.

Emelio M. Garza
ENTERED FOR THE COURT:
United States Circuit Judge
REHG-6A

APPENDIX E -- OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED JULY 12, 2001 AND ENTERED ON JULY 13, 2001 DENYING THE MOTION TO CONTINUE THE MOTION FOR SUMMARY JUDGMENT

Johnson v. Lawson & Lawson Towing Company, Inc., 2001 U.S. Dist. LEXIS 10414 (E.D. La. 2001)
July 12, 2001, Decided
July 12, 2001, Filed; July 13, 2001, Entered
DISPOSITION: [*1] Plaintiff's motion to continue the hearing on the motion for summary judgment denied.
OPINION: ORDER AND REASONS

Plaintiff Thomas E. Johnson has filed a motion to continue and defer the hearing on Lawson & Lawson Towing Company, Inc.'s Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(f). Johnson claims that discovery has not been completed. Defendant Lawson & Lawson opposes the motion, arguing that all discovery relevant to the single summary judgment issue of whether it is negligent as a matter of law to require a seaman to lift 31 pounds without assistance has been completed. Lawson claims that the only discovery necessary is the deposition of the plaintiff, the deposition of Captain David Cavitt, and a vessel inspection of the M/V HENRY B, all of which has occurred. [*2]

The district court does not grant continuances pursuant to Rule 56(f) of the Federal Rules of Civil Procedure as a matter of course. "The nonmoving party must show how the additional discovery will defeat the summary judgment motion, that is, will create a genuine dispute as to a material fact, and may

not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." *Allen v. United States Postal Service, 1997 U.S. Dist. LEXIS 14766,* *5-6, *1997 WL 587761,* *2 (E.D. La. 1997)(citing *International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1267 (5th Cir. 1991)).* Moreover, if "the nonmoving party has not diligently pursued discovery of that evidence, the court need not accommodate the nonmoving party's belated request." Id.

The trial in this case is only a few weeks away, and plaintiff has had ample time to obtain discovery. Plaintiff alleges that defendant has not fully complied with requests for production and that responses to interrogatories have not been completed. (Pl.'s Mot. to Continue Summary J., Aff. Koerner, P 7, P 8.) Plaintiff attaches letters detailing his efforts at completing discovery. However, he has never sought court[*3] assistance to compel discovery responses. Further, plaintiff conclusorily asserts that the purpose of the pending discovery is to "demonstrate the unseaworthiness of the vessel and the negligence of the defendant as well as to impeach the credibility of witnesses relied upon by Lawson & Lawson." Plaintiff, however, has not shown how additional discovery will defeat a summary judgment motion on the sole issue of whether it was negligent as a matter of law to ask a seaman to lift 31 pounds without assistance, i.e., how it will create a genuine dispute as to material fact. See *International Shortstop, 939 F.2d at 1268* (holding that the court erred in denying a continuance when the discovery sought pertained directly to the privilege issue which was the focus of the summary judgment motion)(emphasis added). Plaintiff has inspected the vessel and deposed the captain of the vessel and defendant's corporate representative. Plaintiff points to no specific facts that he expects to gain from additional discovery that are relevant to this one issue of negligence or how any of the discovery he has sought but not obtained has any bearing on the issue before the Court. Therefore, [*4] the Court

denies plaintiff's motion to continue the hearing on the motion for summary judgment.

New Orleans, Louisiana, this 12 day of July, 2001.

SARAH S. VANCE

UNITED STATES DISTRICT COURT

APPENDIX F -- OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED JULY 17, 2001 AND ENTERED ON JULY 18, 2001 GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Johnson v. Lawson & Lawson Towing Company, Inc., 2001 U.S. Dist. LEXIS 10483 (EDLA 2001)

July 17, 2001, Decided

July 17, 2001, Filed; July 18, 2001, Entered

[*1] Defendant's motion for summary judgment granted.

OPINION: ORDER AND REASONS

Before the Court is Defendant Lawson & Lawson Towing Company, Inc.'s motion for summary judgment against Thomas E. Johnson, seeking to dismiss his negligence and unseaworthiness claims. For the following reasons, the Court grants defendant's motion for summary judgment.

I. Background

Plaintiff, Thomas Johnson, alleged that he was injured while employed as a chief relief engineer aboard the M/V HENRY B on August 19, 1999. Defendant, Lawson & Lawson, is the employer of plaintiff and owner and operator of the M/V HENRY B.

On August 19, 1999, Johnson was asked by Captain Cavitt to install a 31 lb. stack fan motor atop a drum-like structure that was three to four feet high and sat on the deck of the M/V[*2] HENRY B. Johnson claims that he asked for assistance but that the Captain refused to give him a helper. Johnson testified that he experienced pain when he initially lifted the motor approximately 3 to 4 feet from a standing position. He then placed the motor on a rail level with the installation surface, and secured one bolt from a seated position. He installed the three other bolts from a standing position, once the motor had been secured by the first bolt. In the course of installing the

motor, Johnson claims that he suffered serious and debilitating injuries to his cervical spine. He testified that it took him 45 minutes to an hour to install the motor. (Pl.'s Mot. Opp. Summ. J., at 9.)

Plaintiff filed suit alleging negligence under the Jones Act, *46 U.S.C. § 688,* et seq. and unseaworthiness under the general maritime law. He seeks past and future medical expenses, past and future lost fringe benefits, past and future lost wages, income and earning capacity, and maintenance and care. The parties do not dispute that Johnson was a Jones Act seaman or that he did install the stack motor. Instead, the parties dispute whether Johnson's injuries arose from[*3] the installation of the motor, and whether Johnson asked for and was denied assistance in installing the motor.

Lawson now moves for summary judgment, seeking to dismiss plaintiff's complaint on the grounds that asking an engineer on a vessel to lift a 31 lb. motor approximately four feet does not establish negligence or unseaworthiness. Defendant admits that the parties dispute whether plaintiff ever asked for help. However, Lawson argues that even if plaintiff's version of the facts were true, and Johnson suffered injury while installing the stack motor by himself, Lawson's actions were not negligent and did not render the vessel unseaworthy as a matter of law.

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2551, 91 L. Ed. 2d 265 (1986).* The court must be satisfied that no reasonable trier of fact could find for the nonmoving party

or, in other words, "that the evidence favoring the nonmoving party is insufficient[*4] to enable a reasonable jury to return a verdict in her favor." *Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).* The moving party bears the burden of establishing that there are no genuine issues of material fact. See *Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1445 (5th Cir. 1993).*

If the dispositive issue is one for which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. See *Celotex, 477 U.S. at 325, 106 S. Ct. at 2552; Lavespere, 910 F.2d at 178.* The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exits. See *Celotex, 477 U.S. at 324, 106 S. Ct. at 2553.* The nonmovant may not rest upon the pleadings but must identify specific facts that establish a genuine issue[*5] exists for trial. See *id. at 325, 106 S. Ct. at 2553-54; Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1996).* In addition, an affidavit will not defeat summary judgment if it contains no more than a scintilla of evidence insufficient to create a genuine issue of fact. See *Anderson, 477 U.S. at 252, 106 S. Ct. at 2512.*

B. Jones Act Negligence

Under the Jones Act, a seaman's employer is liable for damages if the employer's negligence caused the seaman's injury. See *Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 335 (5th Cir. 1997).* The employer is held to a standard of ordinary prudence under the circumstances. See *id. at 336* (explaining that the circumstances include the employee's reliance on his employer to provide a safe working environment, the seaman's experience, training or education).

seaman's experience, training or education). The seaman is held to the standard of the reasonable seaman in like circumstances. See *id. at 339.* Here, the issue is whether Lawson exercised ordinary prudence under the circumstances in asking Johnson to install the motor without assistance.

Lawson argues that it is not[***6**] negligent as a matter of law to require a seaman to lift a 31 lb. motor to a height of 3 to 4 feet without assistance. Lawson first contends that there was no negligence because the position of chief engineer falls into the category of heavy or medium work occupations as defined by the Department of Labor, and that since lifting 31 pounds falls squarely in both those categories, Lawson did not breach its duty. Secondly, Lawson points to case law for the proposition that it is not negligent as a matter of law to ask a seaman to lift an object weighing 31 lbs. See *Thomas v. Diamond M Drilling Co., 569 F.2d 926, 927 (5th Cir. 1978)*(finding no negligence when plaintiff injured his back when lifting and replacing a 60-100 lb. pump cap, when plaintiff had the opportunity to ask for assistance and failed to use safety devices); *Vendetto v. Sonat Offshore Drilling Co., 725 So.2d 474, 479 (La. 1999)*(finding no negligence when plaintiff sustained a ruptured disc after using the SAM method of lowering tools weighing 30-40 lbs. into a tunnel).

The Court finds that the facts here present no issue of negligence. For there to be an issue, the Court would have to[***7**] accept the proposition that it takes two grown men to safely lift 30 to 35 lbs. to a height of 3 to 4 feet. This follows because plaintiff claims to have suffered pain when he was trying to lift the motor. After he lifted it, the work involved securing four bolts, one of which he installed from a seated position and the other three from a standing position with the motor at chest height. The bolt tightening did not involve any lifting. Plain-

tiff's own expert admitted that the amount of weight involved here is "common aboard vessels." (Pl.'s Mot. Opp. Summ. J., Expert Report Eschete, at 4.) Further, he admits in his opinion that he is relying on "common sense" and not on any particular expertise to opine that the installation's height, positioning, and the fact that plaintiff had to "make the bolts fast by himself" contributed to his injury. (Pl.'s Mot. Opp. Summ. J., Expert Repot Eschete, at 3.) Plaintiff's expert adds nothing to the equation since his opinion is not based on any expertise. Moreover, once plaintiff lifted the motor to position, there is no evidence to indicate how plaintiff's having to secure the bolts by himself while seated or standing was dangerous or could cause[*8] him injury. If the motor had fallen and injured plaintiff, it might be different. In a somewhat similar case, *Chisholm v. Sabine Towing & Transportation Co., Inc., 679 F.2d 60, 61 (5th Cir. 1982),* the Fifth Circuit held that plaintiff failed to establish either negligence or unseaworthiness when he showed that he was injured while lifting 40 to 50 pound pieces of iron pipe, which he carried from the engine room up to the main deck and jettisoned overboard. The Court likewise finds that plaintiff has failed to raise an issue of fact that defendant was negligent.

C. Unseaworthiness

As stated by the Fifth Circuit, the test for an unseaworthy condition is whether the vessel, equipment, or appurtenances were "reasonably fit for their intended uses. . . . The duty to provide a seaworthy vessel is absolute and the owner may not delegate the duty to anyone. Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame." *Bommarito v. Penrod Drilling Corp., 929 F.2d 186, 189-90 (5th Cir. 1991).* A vessel's unseaworthiness may arise from a variety of circumstances, including an unfit crew, an improper method of loading[*9] cargo, and an insufficient number of men assigned to perform a shipboard task. See *Us-*

ner v. Luckenbach Overseas Corp., 400 U.S. 494, 498, 91 S. Ct. 514, 517, 27 L. Ed. 2d 562 (1971)(internal citations omitted).

Here, Johnson alleges that both the one-man method of installing the motor and the practice of installing the motor on the vessel rather than in the shipyard were unseaworthy practices. The Court has found that there is no issue of fact that an additional crew member was necessary to perform this installation safely. Further, Johnson admitted that installing the motor onboard the vessel was part of his job, although he wanted help to do it. The Court finds that there are no issues of fact suggesting that the vessel was unseaworthy by virtue of plaintiff's being instructed to install the motor in issue.

III. Conclusion

Accordingly, the Court grants defendant's motion for summary judgment.

New Orleans, Louisiana, this 17th day of July, 2001.

SARAH S. VANCE UNITED STATES DISTRICT JUDGE

APPENDIX G -- OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, DATED SEPTEMBER 14, 2002 DENYING THE MOTION OF PLAINTIFF FOR RECONSIDERATION

Johnson v. Lawson & Lawson Towing Company, Inc., 2001 U.S. Dist. LEXIS 14607 (E.D. La. 2001)

[*1] Plaintiff's motion for reconsideration denied.

OPINION: ORDER AND REASONS

Before the Court is plaintiff's motion for consideration of the Court's July 17, 2001 order granting summary judgment for defendant Lawson and Lawson Towing Company, Inc and the Court's July 12, 2001 order denying plaintiff's motion for deferral of summary judgment pending further discovery. For the following reasons, the Court denies the motion.

I. Background

On July 12, 2001, the Court denied plaintiff's motion to defer the motion for summary judgment pending further discovery. The Court found that plaintiff had not shown how additional discovery would defeat a summary judgment motion on the sole issue of whether it was negligent to ask a seaman to lift 31 pounds without assistance. On July 17, 2001, the[*2] Court granted a motion for summary judgment for Lawson and Lawson Towing Company, Inc. The Court found that the alleged action taken by Lawson and Lawson in requiring plaintiff Thomas Johnson to lift a 31 1b. motor to a height of 3 to 4 feet was not negligent as a matter of law.

Plaintiff now moves the Court to reconsider both orders. Plaintiff asserts that the Court misconstrued the factual basis for plaintiff's injury, which he now claims was not caused by the initial lifting of the motor, but instead when he awkwardly contorted his body to install the motor which contained a defective adjustment bolt. Plaintiff also asks the Court to recon-

sider its July 12, 2001 order and to order that additional discovery be completed.

II. Discussion

A. Reconsideration Standard

The Federal Rules of Civil Procedure do not formally recognize a motion to reconsider in haec verba. See *Pryor v. United States Postal Service, 769 F.2d 281, 285 (5th Cir. 1985).* Nevertheless, the Fifth Circuit has held that a motion for reconsideration to reinstate a case may be classified under either Rule 59 or Rule 60, depending upon the time of filing. See id.; see also *Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990),*[*3] abrogated on other grounds by *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 n.14 (5th Cir. 1994)* (en banc). Because plaintiff's motion was filed with the Court within ten days of the final judgment, the Court treats its request to reconsider the Court's order as a Rule 59(e) motion to "alter or amend the judgment." See *Pryor, 769 F.2d at 285.* Plaintiff's motion to reconsider was filed on July 27, 2001. The Court filed its final judgment into the record on August 1, 2001.

A district court has considerable discretion to grant or to deny a motion under Rule 59(e). See *Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350, 355 (5th Cir. 1993); Lavespere, 910 F.2d at 173.* A court's reconsideration of a prior order is an extraordinary remedy which should be used only sparingly. See *Fields v. Pool Offshore, 1998 U.S. Dist. LEXIS 1122, 1998 WL 43217,* at *2 (E.D. La. Feb. 3, 1998), aff'd, *182 F.3d 353 (5th Cir. 1999); Bardwell v. George G Sharp, Inc., 1995 U.S. Dist. LEXIS 12624, 1995 WL 517120,* at *1 (E.D. La. Aug. 30, 1995). The court must "strike the proper balance between the need for finality and the need to render[*4] a just decision on the basis of all the facts." *Bohlin, 6 F.3d at 355.*

Courts in this district hold that a moving party must satisfy at least one of the following criteria to prevail on a Rule 59(e) motion: (1) the motion is necessary to correct a manifest error of fact or law; (2) the movant presents newly discovered or previously unavailable evidence; (3) the motion is necessary in order to prevent manifest injustice; and (4) the motion is justified by an intervening change in the controlling law. See *Fidelity & Deposit Co. v. Omni Bank, 1999 U.S. Dist. LEXIS 16649, 1999 WL 970526,* *3 (E.D. La. Oct. 21, 1999); *Jupiter v. BellSouth Telecomms., Inc., 1999 U.S. Dist. LEXIS 15567, 1999 WL 796218,* *1 (E.D. La. Oct. 5, 1999); *Burma Navigation Corp. v. Seahorse, 1998 U.S. Dist. LEXIS 17786, 1998 WL 781587,* *1 (E.D. La. Nov. 3, 1998); *Fields, 1998 WL 43217,* *2.

B. Analysis

First, plaintiff argues that the Court apparently misconstrued the factual cause of plaintiff's injury. Plaintiff now asserts that his injury occurred after his second attempt at lifting the motor and while he attempted to install the motor which had a defective adjustment bolt. In support, plaintiff submits a supplemental[*5] affidavits from Leslie Eschete and Thomas Johnson; and photographs of the motor, the mounting bracket, the "defective" adjustment bolt. Plaintiff does not explain why information about this defective adjustment bolt was not presented to the Court before, nor why plaintiff failed to identify installation of the motor with this defective bolt as the cause of his injury during his deposition.

When a party seeks to upset a summary judgment on the basis of evidence that was not timely presented, the district court must balance the following factors: (1) the reasons for the failure to file the evidence in a timely fashion; (2) the importance of the evidence to the moving party's case; (3) whether the evidence was available before the summary judgment decision was made; and, (4) the likelihood that the non-moving

party will suffer prejudice if the motion to alter is granted. See *Hale v. Townley, 45 F.3d 914, 921 (5th Cir. 1995)* (citing *Lavespere, 910 F.2d at 174).*

In this case, plaintiff certainly had evidence regarding the bolt in his possession well in advance of this Court's Order dismissing his claims. See *Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989)*[*6] (refusing to consider documents attached to motion for reconsideration of order granting summary judgment when all of the materials were available to plaintiff when she filed opposition to summary judgment). Indeed, since the accident was unwitnessed, plaintiff was the only person who knew when the injury occurred or how the injury occurred. However, during his deposition, plaintiff never mentioned the defective bolt as a cause of his injury. He also specifically denies that the injury occurred when he tried to lift the motor for the second time, which is when he installed the motor.

Q. Okay, I just wanted to be real specific. I thought you climbed on top and then you lifted up. That's when you had your pain?

R. No. That was my second attempt to get the motor on, which I succeeded at that time. But the first pain was when I lifted it up trying to -- I lifted it chest high trying to get the bolts in it.

(Def.'s Mem. Opp'n Pl.'s Mot. Reconsider, Ex. 4, Johnson Dep., PP 4-12.) Further, in his opposition to summary judgment, plaintiff denies that the injury occurred while he installed the motor. (Pl.'s Mem. Opp'n Def.'s Mot. Summ. J., at 6) ("The pain did not begin[*7] at the time he got on top of the squirrel cage and successfully installed the motor.").

Additionally, plaintiff could have easily informed his expert and his counsel about the adjustment bolt before summary judgment was granted. Indeed, in his supplemental affidavit,

Eschete states that while he was not aware of the defective bolt until he spoke to Johnson on July 23, 2001, Eschete asserts that by May 17, 2001, he knew that the accident happened when plaintiff made his second attempt to install the motor. (Pl.'s Mot. Recons., Eschete Supp. Aff., at P 10.) Eschete therefore certainly had the opportunity to clarify the factual basis of the accident in his initial report before the motion for summary judgment was granted.

Regarding the Court's July 12, 2001 order denying deferral of summary judgment, plaintiff fails to offer any evidence or arguments that merit reconsideration. Plaintiff's counsel provides an affidavit where he merely reiterates some of the very arguments that the Court considered and rejected in its original ruling.

Nothing in plaintiff's motion demonstrates that the motion for reconsideration is necessary to correct a manifest error of fact or law, that plaintiff[*8] presents newly discovered or previously unavailable evidence, that the motion is necessary in order to prevent manifest injustice, or that the motion is justified by an intervening change in the controlling law. See *Fidelity & Deposit Co., 1999 WL 950526,* at *3. Therefore, the Court denies plaintiff's motion to reconsider either the July 12, 2001 or the July 17, 2001 orders.

III. Conclusion

For the foregoing reasons, the Court denies plaintiff's motion for reconsideration.

New Orleans, Louisiana, this 14th day of September, 2001.

SARAH S. VANCE UNITED STATES DISTRICT COURT

APPENDIX H – THE ORIGINAL BRIEF OF THOMAS JOHNSON, PLAINTIFF AND APPELLANT FILED ON NOVEMBER 26, 2001

ORIGINAL BRIEF OF THOMAS JOHNSON, PLAINTIFF AND APPELLANT

MAY IT PLEASE THE COURT:

STATEMENT OF JURISDICTION ON APPEAL

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, as a timely appeal (Dkt. 56, R-261, Record Excerpt ["RE"] RE-9-10) from the final judgment of July 17, 2001 (Dkt-44, R-454, RE-11) filed on August 1, 2001 (Dkt- 51, R-323, RE-1), which was the granting of the motion for summary judgment in favor of Lawson & Lawson Towing Company, Inc. ("Lawson") (R-362-369, RE-23-30), the denial of the motion to defer consideration of the motion for summary judgment under Rule 56(f) by opinion of July 12, 2001, entered on July 13, 2001 (Dkt-41, R-471, RE-20-22), the minute entry of September 14, 2001 denying the motion for reconsideration (Dkt-55, R-264, RE-23-30) and from any other adverse final or interlocutory orders entered during pendency of the litigation in the district court.

STATEMENT OF ISSUES PRESENTED

1. Given the meager burden of proof of negligence and causation in a Jones Act case, was this the exceptional case that merited an initial entry of summary judgment adverse to the seaman, Chief-Engineer plaintiff?
2. When the misunderstanding of the true facts was also fostered by the refusal of the defendant to provide access for deposition to Ernie Hunt, the oiler, until Hunt had left Lawson's employ and his whereabouts became unknown until shortly before the

scheduled trial and too late to obtain his deposition testimony for discovery or perpetuation, should the district court have postponed the hearing of the motion for summary judgment or its reconsideration until this discovery had been completed?

3. In a circumstance in which the plaintiff and his counsel reasonably ascertain that the initial understanding of plaintiff's deposition as articulated by both mover and respondent was incorrect, thus making the initial opposition incorrect, and the true facts, which included clear proof of the liability of Lawson and the unseaworthiness of the vessel, are demonstrated with certainty in a motion for reconsideration, supported by pictures and affidavits, which explained the plaintiff's deposition testimony, gave the reason for the initial misperception of the facts, and established important factual issues that would have precluded summary judgment had they been asserted in the original opposition, was it an abuse of discretion for this simply to be ignored by the trial court and the motion for reconsideration denied with only the comment that nothing new had been provided and that the fault was plaintiff's and without considering the substantive impact of the true facts or the inappropriateness of the granting of the initial summary judgment based on those facts?
4. Should plaintiff's affidavit and the supplemental affidavit of the expert have been sufficient to require reconsideration since they explained the ambiguity in plaintiff's deposition, so that his credibility would have become an issue for the jury rather than a reason to simply dismiss his case?

STATEMENT OF THE PROCEEDINGS BELOW

The complaint herein was filed on March 1, 2000. Answer was filed on June 14, 2000. The deposition of plaintiff was taken on September 9, 2000. Trial on the merits was initially set for May 14, 2001, but was reset on account of a schedule conflict of Louis R. Koerner, Jr., liability counsel for plaintiff who made an appearance on January 30, 2001 and moved for a continuance which was granted on February 16, 2001. The depositions of Vance Lawson and Captain Cavitt were taken on April 24, 2001. The long-delayed vessel inspection was had on May 4, 2001. Plaintiff's counsel was out of the country from May 7-13, which was the reason for the continuance of the initial trial setting. The motion for summary judgment was filed by defendant on June 5, 2001 and set on June 20, 2001, when it was known that plaintiff's counsel would be out of the country from May 30-June 30, 2001. Even after the continuance, it was necessary that the opposition to the continued motion for summary judgment be filed by July 5, 2001, less than a week after his return.

Plaintiff also filed a motion to compel discovery and alternatively for the imposition of sanctions, including preclusion of witnesses, as well as a motion to defer the motion for summary judgment until completion of discovery. This was denied on July 12, 2001 (Dkt-41, R-471, RE-20-22).

The motion for summary judgment was granted on July 17, 2001 (Dkt-44, R-454, RE-23-30), but final judgment was not filed until August 1, 2001 and entered on August 2, 2001 (Dkt-51, R-323, RE-11).

Prior to the entry of final judgment, plaintiff, on July 27, 2001, filed a motion for reconsideration and to permit depositions of Ernie Hunt and Dr. Greg Ungerank, D.C. (Dkt-50, R-325)

The supplemental Koerner affidavit contains important information about Hunt and Chestnut:

7. The purpose of the testimony of Mr. Hunt would be to verify that the stack fan motor was out of service for an abnormal period of time, that the adjusting bolt was rusted, corroded, and otherwise inoperable, that the process for installing the stack fan motor required a working adjustment bolt, and the consequences to the attempt to mount the motor onto the mounting bracket without being able to adjust it down so that the motor was resting on the stack fan blower. He will establish that it is a two-man job and the reason therefor, and why the lack of the adjustment bolt made the job more difficult and even dangerous to a small and slight man such as Johnson. It is also expected that Mr. Hunt will establish the circumstances under which he was instructed not to talk to any representative of the plaintiff, by whom, and why.
8. The testimony of Roy Chestnut will establish that Mr. Johnson notified him, at the time of the removal of the stack fan motor for repairs, that the adjustment bolt was inoperable and should have been replaced. Mr. Chestnut will establish the time sequence of the removal of the stack fan motor for repairs and the proper procedure for its reinstallation. He will establish that it is a two-man job and the reason therefor, and why the lack of the adjustment bolt made the job more difficult and even dangerous to a small and slight man such as Johnson.

The motion for reconsideration was denied with written reasons on September 14, 2001 (Dkt-55, R-264, RE-31-37). The timely notice of appeal (Dkt. 56, R-261, RE-9-10) was filed on September 18, 2001.

STANDARD OF REVIEW

A. General Rule

The general rule was recently restated in *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, No. 00-11270 (5th Cir. November 13, 2001), a case in which this Court found issues of material fact that necessitated reversal and remand of a granted summary judgment:

> We review a grant of summary judgment de novo, applying the same standard as the district court. *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An issue is material if its resolution could affect the outcome of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding whether an issue of fact exists, we must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

B. The Legal Standard Applicable to Jones Act Cases

In the unpublished but instructive case of *Rapitis v. Sea-Land Corporation*, 1991 U.S. App. LEXIS 85, *4-5 (9th Cir. 1990) (Table Case at 921 F.2d 281, 1990 U.S. App. LEXIS 33703), the court stated in language applicable to the present case:

> Rapitis sues under both the Jones Act and the doctrine of unseaworthiness. Under the Jones Act an employer is liable for the injuries of his crew when the employer is negligent. 46 U.S.C. § 688; 45 U.S.C. § 51

et. seq. But the negligence standard for personal injury actions brought under the Jones Act is substantially lower than in regular tort actions. *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770-71 (9th Cir. 1981) (Jones Act cases require a very low evidentiary threshold for submission to the jury); accord *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989), cert. denied, 110 S. Ct. 1783 (1990) ("A seaman in a Jones Act case has only a 'featherweight' burden of proof; he need prove only slight negligence, 'which can be accomplished by very little evidence.'") (quoting *Allen v. Seacoast Prods.*, 623 F.2d 355, 360 (5th Cir. 1980); *Petersen v. Chesapeake & Ohio Ry.*, 784 F.2d 732, 740 (6th Cir. 1986) (same).

Because of the low standard of negligence, summary judgment is not favored in Jones Act cases: "Courts should exercise special care in considering summary judgment in Jones Act cases which require a very low evidentiary threshold for submission to the jury." *Lies*, 641 F.2d at 770. Summary judgments "are to be cautiously granted, and 'if there is to be error at the trial level it should be in denying summary judgment in favor of a full live trial.' This is especially true in the case of actions brought under the Jones Act." *Id.* at 772 (citations omitted).

Ship owners also have the duty of providing their crew with a seaworthy vessel. Negligent orders, having insufficient crew members, and assigning too few crew members to a job all breach this duty. See, e.g., *Drachenberg v. Canal Barge Co.*, 571 F.2d 912, 918 (5th Cir. 1978); *Mascola v. Pacific Coast Transport Co.*, 421 F.2d 1281, 1283 (2d Cir. 1970).

Please also see *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770 (9th Cir. 1981):

Applying these principles to the facts of this case, we find the district court erred in granting summary judgment for Farrell Lines on the issue of liability for the accident occurring aboard the S.S. Texaco New Jersey. At least two issues of material fact were in dispute: (1) whether Lies' left hand was weak as a result of the prior accident on the Austral Pilgrim; and (2) whether any weakness in the hand contributed to Lies' fall from the rigging. The second issue is the crucial one, because if the court could hold, as the district court did, as a matter of law that the alleged negligence of Farrell Lines was not a cause of the injuries sustained in the Texaco New Jersey accident, then the first issue becomes immaterial.

Causation is generally a question of fact for the jury, unless "the proof is insufficient to raise a reasonable inference that the act complained of was the proximate cause of the injury." *Leaf v. United States*, 588 F.2d 733, 736 (9 Cir. 1978). Since the sufficiency of proof test involves a legal determination by the court, proximate cause may be said to be a mixed question of law and fact, which is generally sufficient to preclude summary judgment. See *Pepper & Tanner, supra* at 396. Courts should exercise special care in considering summary judgment in Jones Act cases which require a very low evidentiary threshold for submission to a jury. *Leonard v. Exxon Corporation*, 581 F.2d 522, 524 (5 Cir. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 397 (1979).

In like manner, the court in *Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199, 1205 (6th Cir. 1990) stated:

> Our consideration of the propriety of summary judgment in the case at bar is animated by two additional concerns. First, we have previously explained that "there is eminent authority in support of the proposition that issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner." *Rogers v. Peabody Coal Co.*, 342 F.2d 749, 751 (6th Cir. 1965). Second, in light of the "policy of providing an expansive remedy for seamen, submission of Jones Act claims to a jury requires a very low evidentiary threshold; even marginal claims are properly left for jury determination." *Leonard v. Exxon Corp.*, 581 F.2d 522, 524 (5th Cir. 1978), cert. denied, 441 U.S. 923, 60 L. Ed. 2d 397, 99 S. Ct. 2032 (1979). See also *Searcy v. E.T. Slider, Inc.*, 679 F.2d 614, 616 (6th Cir. 1982); *Lies v. Farrell Lines, Inc., 641 F.2d 765, 770* (9th Cir. 1981).

See also, *Ribitzki v. Canmar Reading & Bates, Ltd.*, 111 F.3d 658, 660 (9th Cir. 1997) and *Rannals v. Diamond Jo Casino*, 265 F.3d 442 (6th Cir. 2001) (both reversing summary judgments in seaman cases).

C. Standard of Review on the Motion for Reconsideration

"Refusal to grant reconsideration is tested under an abuse of discretion standard, . . . the Judge has to consider judicially the record at the time of the motion for reconsideration not just as it existed at the time of the initial ruling." *Xerox Corporation v. Genmoora Corp.*, 888 F.2d 345, 349 (5th Cir. 1989). "He was obliged to reconsider and rescind the interlocutory summary judgment order. Failure to do so constituted an abuse of discretion." *Xerox*, 888 F.2d at 356.

In *Hobbs v. USA*, 1997 U.S. Dist. LEXIS 19230, *14-15 (S.D. Tex. 1997), the court, in granting reconsideration, stated:

> The Federal Rules of Civil Procedure make no provision for motions to reconsider interlocutory orders

such as the one the court entered on September 25, 1997. However, district courts have broad discretion to reconsider interlocutory orders at any time prior to the entry of a final judgment. See *Millar v. Houghton*, 115 F.3d 348, 350 (5th Cir. 1997); *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 356 & n.62 (5th Cir. 1989); *American Stone Diamond, Inc. v. Lloyds of London*, 934 F.Supp. 839, 841 (S.D. Tex. 1996) (Werlein, J.). A district court is free to reconsider interlocutory orders "for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *American Stone Diamond*, 934 F.Supp. at 841 (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990)). An error of law in an interlocutory order is a sufficient reason to grant a motion to reconsider. *Zimzores v. Veterans Admin.*, 778 F.2d 264, 266 (5th Cir. 1985).

The discovery and disclosure problems in this case are reminiscent of those found material in *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1536-37 (8th Cir. 1996) (noting the essential nature of discovery in opposing summary judgment and permitting reconsideration under Rule 60(b)(2)).

SUMMARY OF THE ARGUMENT

1. Given the meager burden of proof of negligence and causation in a Jones Act case, this was not the exceptional case that merited an initial entry of summary judgment adverse to the seaman, Chief-Engineer plaintiff. Even if one were to accept the version of facts as misperceived by plaintiff's counsel and urged to the district court by the defendant, there is still a question of fact that should have been sufficient to prevent summary judgment.

Summary judgment was not even appropriate on the sole issue of lifting 31 lbs., because there was no evidence, but only argument, that this is a job that could be done safely by only one man, particularly a man who is 5'8" and 130 lbs. The only sworn evidence, that of Thomas Johnson is completely to the contrary. Neither of the other witnesses who have been deposed, Vance Lawson or Captain Cavitt, had personal knowledge of the installation of a stack fan or had seen this done.

Certainly, once the district court had before it, the additional affidavits and pictures, summary judgment was no longer appropriate and should have been reconsidered.

2. When the misunderstanding of the true facts was also fostered by the refusal of the defendant to provide access for deposition to Ernie Hunt, the oiler, until Hunt had left Lawson's employ and his whereabouts became unknown until shortly before the scheduled trial and too late to obtain his deposition testimony for discovery or perpetuation, should the district court have postponed the hearing of the motion for summary judgment or its reconsideration until this and other necessary discovery had been completed?

3. In a circumstance in which the plaintiff and his counsel reasonably ascertain that the initial understanding of plaintiff's deposition as articulated by both mover and by counsel for respondent was incorrect, thus making the initial opposition incorrect, and the true facts, which included clearly demonstrated proof of the liability of Lawson and the unseaworthiness of the vessel, are presented with certainty in a motion for reconsideration, supported by pictures and affidavits, which explained the plaintiff's deposition testimony, gave the reason for the initial misperception of the facts, and established important factual issues that would have precluded summary judgment had they been asserted in the original opposition, this could not simply be ignored by trial court and denied with only the comment that nothing new had been provided and that the fault of the mis-

perception was that of the plaintiff. Rather there should have been a consideration of the substantive impact of the true facts or the inappropriateness of the granting of the initial summary judgment based on those facts the lack of which constituted an abuse of discretion on the part of the district court.

4. The affidavits of the plaintiff and his expert, Lesley Escheté, should have been sufficient to require reconsideration since they explained the ambiguity in plaintiff's deposition and did not contradict it. Any issue would have been a credibility issue for the jury.

DISCUSSION OF THE FACTS

A. The Facts as They Appeared to Be at the Time of the Initial Opposition

Despite the best efforts of counsel for plaintiff, only three depositions were taken, although more had been requested and were supposedly planned,[1] to wit: Thomas E. Johnson ("Johnson"), Vance Lawson ("Lawson"), and Captain Eugene David Cavitt (a/k/a Spec, "Cavitt"). A condensed version of the full text of these depositions is contained in the record, beginning at R-35. References to these depositions in this memorandum and in the response to the uncontested statement of facts are made to the page/line of the deposition and also to the page of the condensed version that appears in the record beginning at R-35.

---

[1] The details of the discovery difficulties are more fully developed in the Rule 56(f) motion to defer disposition of the motion for summary judgment until trial and in the Discovery Conference Certificate for the July 2, 2001 discovery conference which is also filed herewith.

On the date of the accident, Johnson was 5'8", 130 lbs,[2] and was making $135.00 per day.[3] He had begun his employment with Lawson as an oiler and moved up to being a relief chief engineer.[4] Although normal hitches were thirty days on and fifteen days off, Lawson would let the crewmembers stay as long as they wanted.[5]

Johnson was injured on the *Henry B*, a pushboat of approximately 250 feet in length,[6] with three screws generating 8400 horsepower.[7] The *Henry B* was operated by two mates, a cook, two or three deckhands, two engineers, a captain, and a pilot.[8] The other person on Johnson's watch was Steve Walker.[9]

Inasmuch as the regular chief engineer, Roy Chestnut, was in detox,[10] Johnson was the chief engineer at the time of the accident.[11] Johnson ran the morning shift, and Ernie Hunt, an oiler,[12] ran the evening shift, the shifts being six and six.[13]

---

[2] Johnson 62/21-25, p. 13.

[3] Johnson 18/17-18, p. 4.

[4] Johnson 40/21-23, p. 8.

[5] Johnson 42/12-17, pp. 8-9.

[6] Johnson 37/9-13, p. 7.

[7] Johnson 38/1-15, p. 8.

[8] Johnson 39/1-8, p. 8.

[9] Johnson 40/12-14, p. 8.

[10] Lawson, 8/14-21, pp. 23-24; Cavitt, 7/8-18, p. 34..

[11] Johnson 41/1, p. 8.

[12] His deposition was requested while he was employed by Lawson and over and over again since that time. It was con-

Although the chain of command on the *Henry B* was the captain, the pilot, and then the chief engineer, Captain Cavitt maintained close charge, so that Johnson could only obtain assistance from a deckhand or the oiler if the captain ordered.[14]

The *Henry B* was passing through Greenville, Mississippi when the supplies and parts, including the newly-repaired stack fan motor, were delivered to the vessel by a launch operated by the Greenville boat store[15] and were unloaded by the deckhands and Johnson.[16] Cavitt inspected the parts and supplies:

> He seen the stack fan motor was there. And he told me to install it, but he didn't want me to use Ernie because he had done made several accidents on the boat. Like he filled the bilge up full of diesel and he liked to hacw (have) electrocuted himself and stuff like that, so they wanted me to let him to sit in the booth and watch the indicators only, do no work. Okay? So he said get the motor installed the best way I can.
>
> I asked him for a deckhand; he refused. He just said: "Get it the best way you can; get your job done." So he wouldn't let me use my oiler, he wouldn't let me use a deckhand, so I was there having to do it myself and

---

firmed at Lawson's deposition that he had left Lawson's employ. Lawson, 8/22-24, p. 24; 52/24-53/23, p. 33.

[13] Johnson 41/17-25, p. 8.

[14] Johnson 43/15-18, p. 9. "No, sir. I got to go through the captain." Johnson 44/1-2, p. 9.

[15] Johnson 59/24-12, p. 12.

[16] Cavitt 17/18-19, p. 37.

> struggled a lot with it and had pains in my neck and then burning sensations and pains in my arms and stuff.[17]

According to the stack fan motor specifications produced at Lawson's deposition, the stack fan motor weighed approximately 31 lbs. not including the weight of any belts or bolts. This was not too much to lift, "if you've got proper help, you wouldn't have no problem lifting it."[18] "Like I said, if it wouldn't be -- it depends on the proper position you're in and where you've got to put it at."[19] This is because installing a stack fan motor is not nearly as easy as Lawson had the district court believe:

> A Well, they've got a squirrel cage. All right? And it's about chest high up to me, and I tried lifting it and struggling to lift it up like this (witness indicating) and setting it. That's a two-man job. You've got to put it up there and hold it and batch the bolt holes up and come around with the bolt. You cannot do it.[20]
>
> So I felt strain and pain in my neck, and so I climbed up on the squirrel cage and lifted it the best I could and struggled a lot. It took me anywhere from forty-five minutes to sixty minutes to do it, and I finally got it installed. And I went and told Spec that I felt pain in my neck and burning sensation down my neck and arm.[21]

---

[17] Johnson 60/16-61/8, p. 12.

[18] Johnson 63/21-23, p. 13.

[19] Johnson 64/12-14, p. 13.

[20] He crawled to the top of the squirrel cage, which was approximately four feet off of the deck. Johnson, 74/2-7, p. 15.

[21] Johnson 64/19-65/14, p. 13; 67/5-13, p. 14. Johnson's description of the accident situs, other than the weight of the mo-

As may be seen from the explanation from his affidavit, Johnson started to feel pain when he lifted the motor, after it was already on top of the stack fan housing, and he had attempted to put it in the bolt holes. The pain began at the time he got on top of the squirrel cage and successfully installed the motor.[22] This is the difference between the initial opposition and the true facts.

The oiler, Ernie Hunt, was in bed at this time, which was approximately at the beginning of the evening shift that began at 6:00 p.m. while it was still light but getting dark:[23]

> if the captain wouldn't have ordered me not to use him, I could have woke my oiler up to come help me. But the captain ordered me not to work him period, but let him watch gas gauges, oil gauges, and stuff in the boat.
>
> Q Now, just so I understand, it's your testimony that Captain Spec told you, one, you couldn't use Ernie; is that right?
>
> A That's right.
>
> Q And Captain Spec told you that you couldn't use the deckhand either?
>
> A That's right.
>
> Q You're positive about that?
>
> A I'm positive.

---

tor, precisely matched that of the May 4, 2001 inspection and the pictures taken on that date. The burning sensation was first down his left arm and side. Johnson 73/4-12, p. 15.

[22] Johnson 74/20-75/19, p. 15.

[23] Johnson 82/14-25, p. 17.

Q As we sit here today, you recall him telling you that specifically?

A Specifically.

Q Okay. Why would the captain not let you use the deckhand?

A I don't know. I don't want to be rude or nothing, but the man had an attitude problem from the beginning anyway to everybody. He's hard; he likes driving people hard.[24]

The accident occurred because the captain denied Johnson the help that he requested.[25] While the captain would not admit that he denied assistance to Johnson, he admitted that he knew nothing of the procedure for installing a stack fan motor and had never seen it done.[26] Cavitt also admitted that his general policy and good maritime practice required giving a person help when it was requested:

Q Okay. Now, what is your policy on having help for people when they ask for it?

A When I'm the master on the boat if a man needs help he asks for it and he gets it.

Q Why is that?

A It's just a general courtesy.

Q Okay. So if you had realized that Mr. Johnson wanted help you would have seen to it that he got help?

A Yes.

Q Regardless of whether you thought the job required help?

A If he asked for help he would have got it.

---

[24] Johnson 75/22-76/22, pp. 16-17.

[25] Johnson 85/7-86/12, pp. 17-18.

[26] Cavitt 13/13-17, p. 36.

Q Okay. You have no recollection of him asking for help --

A No.

Q -- installing the stack fan?

A No.[27]

Deckhands were also supposed to be available to help in the engine room, "no matter what."

But the captain ordered no deckhand and no working Ernie Hunt, just let him sit in the booth and watch gauges and stuff on his watch.

Q Who is sitting in the booth watching gauges?

A Well, nobody at that time. We swapped watches. Okay?

* * * *

A All right. Spec said to let him sit there and watch gauges, Don't let him do no kind of work because he done filled the bilge up full of diesel and everything. But if I would have really needed him, and if the captain wouldn't have ordered me not to, I was supposed to be able to go wake him up and let him come help me. And then he can go back to bed. But the captain ordered me strictly not to because he felt he was a hazard to our lives out there. And he was. He was seventy- something years old. He had a pinkie and a thumb. And I can't remember exactly which arm it was, and, like I said, he liked to have got electrocuted a few days before I got

---

[27] Cavitt 13/18-14/10, p. 36. This testimony was reiterated and amplified at Cavitt 36/6-15; 37/12-38/4, pp. 40-41.

myself hurt. The captain ordered him not to do nothing but sit and watch gauges.[28]

Hunt was more than seventy years old and had lost several fingers from his dominant hand.[29] Hunt had been involved in a number of incidents, such as an incident where he was found at fault when the engine room was flooded with diesel fuel.[30] Nevertheless, he would have been one of the few people the chief engineer could ask for assistance.[31]

It took forty-five minutes to an hour to install the motor. Johnson had previously installed a motor on another boat with help.[32] Help, which in the present case the captain denied, but was indeed also available on the *Henry B.* The captain could have ordered Hunt, who was in bed, or the deckhands were either watching television or out on deck to help Johnson.[33]

Johnson had several times requested that the stack fan motor be replaced. Moreover, the *Henry B* had been in two different shipyards[34] subsequent to the stack fan motor going bad, one of which was Bollinger Shipyard in Harvey on August 1-3, 1999.[35] The issue of replacing the stack fan motor would have

---

[28] Johnson 77/7-78/11, p. 16.

[29] Lawson 9/3-10; 10/6-24, 11/7-12, p. 24; Cavitt 21/1-9, p. 37.

[30] Cavitt 18/7-20/23, p. 37.

[31] Cavitt 17/20-18/3, p. 37.

[32] Johnson 78/19-24; 79/2-4, 11-15, p. 16.

[33] Johnson 79/20-25, p. 16.

[34] Johnson 83/23-85/1, p. 17. This was to keep himself from getting injured.

[35] Cavitt 8/24-9/7; 11/13-18, p. 35.

been addressed to Dale Conner, the Lawson Port Engineer.[36] Johnson asked specifically:

> "Why don't we get the stack fan motor while we're at the shipyard and install it, because it pulls out all the carbon monoxide and all that stuff where you won't be choking up in there, and it's a hazard to your health."

The reason that the stack fan was not reinstalled at Bollinger was that it had been taken off prior to Johnson's hitch and repairs had not been completed by the time that the vessel was in for repairs at Bollinger, so that the repaired motor only became available on August 16, 1999, two weeks later[37] the day on which its installation was memorialized on the engine room log.[38]

After the accident, Johnson told anyone who would listen about what had happened to him that included Steve Walker, whose deposition has been requested.[39] Cavitt admitted that Johnson had talked to him about installing the motor, but denied any knowledge of a connection between the installation and the claimed neck and arm problem.[40] In a remarkable breaking of ranks between the witnesses for the defendant, Vance Lawson admitted that he had discussions between August 18-31 with Captain Cavitt[41] concerning Johnson's conten-

---

[36] Lawson 16/14-18/3, p. 25.

[37] Cavitt 9/8-11/25, p. 35.

[38] Johnson 92/23-93/14, p. 19; Lawson 21/6-7, p. 26.

[39] Johnson 90/14-24, 91/1-7, p. 18.

[40] Cavitt 22/1-23, p. 38.

tion that the installation and lifting of the stack fan motor physically injured him and caused his neck and arm pain:

A I'm sure we would have had conversations from the date of this August -- The comments of that we would have, too, so we would have talked more than the two times we talked to Tommy to take him off the boat. Sure. To tell you the exact days, no. I don't know. I'm sure we have.

Q Was there any discussion at any time about the stack motor?

A I'm sure we would have had a -- Mentioned the stack motor. I'm sure. At the time I couldn't tell you.

Q You mean which time?

A Well, which time? We talked more than twice. Because Tommy -- Yes. You mentioned two times.

Q Okay. I'm trying to figure out when the -- It's my impression from the answer the issue of the stack motor came up before Tommy went back to Louisiana. Am I correct?

A I would assume, yes.

Q Okay. So at some point or other the captain became aware that it was Tommy's contention that he had been involved with a stack motor and that had somehow caused or contributed to his problems?

A Yes.

Q When was that?[42]J

---

[41] Cavitt denies these conversations. Cavitt 27/6-15, pp. 38-39; 31/6-32/9, pp. 39-40; 33/24-35/7, p. 40.

[42] Lawson 46/14-47/7, p. 31; 48/4-49/11, p. 32. His counsel was unable to shake this admission, although he tried. Lawson 55/3-21, p. 33, but see Lawson 57/11-14, pp. 33-34.

In sworn deposition testimony, Lawson admitted and then denied that he had had contemporaneous conversations with the captain about Johnson's contention that he (Johnson) had been denied assistance in installing the stack fan motor.[43] Cavitt testified that Johnson began complaining about neck pain on August 18, two days after installing the motor, and that a day or two later, Cavitt informed Lawson so that Johnson could be taken off of the *Henry B* and be brought to see the chiropractor on August 25.[44]

The office of Lawson & Lawson is located in Wynne, Arkansas, a location remote from the Mississippi River. A crew van was driven to Helena, Arkansas, which was approximately one and a half hours away from Wynne by Ricky Reed, whose deposition has also been requested.[45]

After the accident, Johnson was first seen by a chiropractor in Wynne, who did not help.[46] Lawson chose the chiropractor:

> A I just asked them to get me a chiropractor, a doctor or whatever they can get me. And Vance said I got a chiropractor that I use, and he sent me to the chiropractor.[47]

Lawson initially denied having prior dealings with the chiropractor, Dr. Ungarank, and contended that Johnson had asked

---

[43] Lawson 50/24-52/23, pp. 32-33. Captain Cavitt flatly denied this. Cavitt 35/16-36/15, p. 40.

[44] Cavitt 23/7-13, p. 38.

[45] Lawson 22/9-23/4, p. 26; Cavitt 24/24-26/8, p. 38. Johnson was returned in Memphis and was gone 15 hours.

[46] Johnson 58/21-59/14, pp. 58-59.

[47] Johnson 59/6-9, p. 12.

to see a chiropractor, although Lawson slipped up and initially stated that Johnson had asked to see a doctor.[48] He then stated that he had offered Johnson a choice of a male and a female chiropractor.[49] Lawson actually "carried" Johnson to Dr. Ungarank's office.[50] Although he was unable to remember whether he had helped Johnson fill out the personal history form,[51] Lawson was actually present in the waiting room during the examination and paid for the visit.[52] Completely contrary to the defendant's position that there was no accident and that the only report was of a "crick" in the neck, the report, Lawson 1, contained the notation under "probable cause," that stated: "Possible installing motor."[53] Lawson was unable to explain the discrepancy.[54] Moreover, Ungarank, whose deposition was requested, would have contradicted Lawson.

Johnson thought being sent to a chiropractor, particularly when he had never before been to a chiropractor, rather than to a doctor, was a denial of the medical attention that he needed.[55] Johnson continued to complain, was again taken off of the vessel and brought to Wynne by the crew van, and was sent to Dr.

---

[48] Lawson 25/8-11, p. 27.

[49] Lawson 25/18-16, p. 27.

[50] Lawson 26/17-20, p. 27.

[51] Lawson 26/21-27/21.

[52] Lawson 26/24-27/24, p. 27; 31/2-14, p. 28.

[53] Lawson 30/15-31/1, p. 28.

[54] Lawson 31/24-32/4, p. 28.

[55] Johnson 86/19-87/3, 89/2-16, p. 18; Johnson, 96/5-12, p. 19-20.

James Jacobs, a family practitioner in Wynne,[56] who seemed think that Johnson had suffered a muscle strain.[57] Under intense questioning, Lawson admitted that Jacobs was his family physician and his personal doctor.[58] At Johnson's request, he was taken back to Louisiana via the crew van.[59]

Lawson also told an inconsistent story concerning the authorization for and payment of the surgery in Louisiana. Initially, Lawson claimed:

> A Mr. Johnson got medical attention and had surgery and I did not even know about it. I didn't know Tommy Johnson had surgery until he already had his surgery.[60]

In truth and in fact, Lawson had been contacted in advance of the surgery, had to authorize it, and had to send a deposit check to the hospital.[61] Lawson paid some $12-$14,000.[62]

---

[56] Lawson 33/24-35/1; 36/6-22, p. 29; 37/16-17, p. 29.

[57] Johnson 109/7-23, p. 22; Lawson 39/5-9, p. 30.

[58] Lawson 36/23-37/20, p. 29.

[59] Lawson 39/11-19, p. 30.

[60] Lawson 40/2-4, p. 30.

[61] Lawson 54/3-24, p. 33; 56/14-10, p. 33.

[62] Lawson 56/6-9, p. 33.

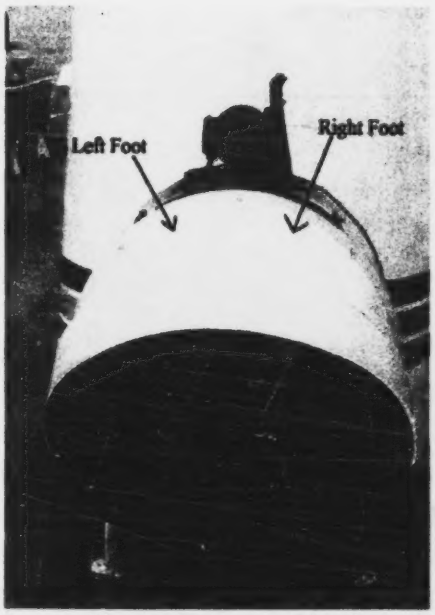
B. The Facts As Urged on Reconsideration

The accident occurred not as suggested by Lawson & Lawson, not as accepted by the Court in its opinion, nor even as incorrectly perceived on page 5 of plaintiff's opposition.[63] The accident did not happen as the motor was initially lifted by Johnson in that Johnson was unable to secure the bolts and the nut through the mounting plate. Rather the accident occurred as Johnson was lifting the motor off of the stack fan tunnel (where it he had placed it after his first try at lifting) after he climbed up on the stack fan tunnel, and as Johnson was trying to maneuver the motor and the fastening bolts through the slots in the mounting bracket by using his forearm and his foot. Johnson used his forearm to push up the belt while holding the motor. This was necessitated by the defective adjustment bolt. The adjustment bolt would not work to permit the pulley to be loosened and the bolts on the mounting bracket lowered so that the motor could have been rested on the deck, and the installation done safely.

Not only was the adjustment bolt defective at the time of the accident, making the vessel unseaworthy, but Johnson had told the chief engineer, Roy Chestnut, of the problem at the time that the motor was initially removed for repairs.(Escheté supplemental affidavit ¶ 7, R-353.) See the pictures and the graphic, which is attached at the last page of this brief.

---

[63] There was an ambiguity in the deposition reference, Koerner had not been original counsel for Johnson, and the unfortunate incorrectness of his understanding was corrected by Messrs. Johnson and Escheté on July 23.



It can be seen how and where Johnson put his left and right foot, how he picked up the motor with his arm, and how he lifted up the motor with his foot. Without the ability to move the slider down, the bolt, nut, and pulley, all three had to be lined up at the same time. This required Johnson to assume the awkward and dangerous position on top of the stack fan tunnel that is shown in the photographs above.

The purpose of adjustment bolt was to line up the bolts of the motor with the mounting bracket. It also permitted the pulley to be adjusted to allow the belt to be put on independently of the motor bolts.

Mr. Johnson is far smaller than the person in the pictures given to the district court by Johnson & Johnson. He is 68 inches tall. As may be seen from the annexed graphic, the stack fan blower is 46 inches high, plus the height of the mounting bracket.

ARGUMENT ON THE LAW

A. Jones Act Negligence

An employer's potential liability in a Jones Act negligence case extends to all personal injuries arising during the course of the seaman's employment. As the court noted in its reasons for granting summary judgment, proof of negligence is essential to recovery. *Domonter v. C.F. Bean Corp.*, 99-1204 (La.App. 5 Cir, 4/25/00); 761 So.2d 629. The employer's negligence may arise in many ways, including the fail[illegible]e to use reasonable care to provide a seaman with a safe place to work, the existence of a dangerous condition on or about the vessel, or any other breach of the duty of care. *Id.* at 643, "General maritime law imposes a general duty of reasonable care on a vessel owner toward those who come aboard the vessel." *In the Matter of: Falcon Inland, Inc.*, 97-0360 (E.D.La. 8/6/99), 1999 U.S. Dist. LEXIS 12384, *19. As an owner and operator of a vessel, Lawson has a duty to follow its own safety rules. *Id.*, at *20.

An employer and the seaman are subject to a duty to exercise reasonable care. *Domonter v. C.F. Bean Corp.*, 761 So.2d at 634, citing to *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997); *Vendetto v. Sonat Offshore Drilling Co.*, 97-3103 (La.1/20/99); 725 So.2d 474, 482; *Foster v. Destin Trading Corp.*, 96-803, p. 7 (La. 10/21/97), 700 So.2d 199, 208.

The court stated the following in *Domonter:*

> In *Foster,* the Supreme Court cited with approval the standard of care announced in *Gautreaux*, but alluded (as *Gautreaux* did) **to the necessity only of "slight" evidence to meet the burden of proving the causation prong of liability determination**. (emphasis added). This was followed in *Vendetto v. Sonat Offshore Drill-*

ing Co., 97-3103(La.1/20/99), 725 So.2d 474, 482. The court in *Vendetto* stated:

> Nevertheless, since the duty to provide a safe place to work allocates substantial risks of maritime employment to the employer, identical conduct is not demanded of the employer and the employee...**The law allocates different risks to different parties, and that allocation forms parts of the reasonableness equation in the negligence determination**. A defendant's standard of care, like that of the plaintiff, varies according to the conduct in which the party is engaged.
>
> . . . .
>
> **Only if the seaman's own negligence was the sole cause of his injuries, will recovery be barred.** (emphasis added). *Id.*, at 634-635.

The case that appears most similar to this case is *Rapitis*, 1991 U.S. App. LEXIS 85 (9th Cir. 1991). There, assistance was neither offered nor requested as to heavy chain falls. The motion for summary judgment granted by the district court was reversed by the court of appeals, who after discussing the disinclination of the courts to grant summary judgment in Jones Act cases with a low standard of negligence, stated, *inter alia:*

> Ship owners also have the duty of providing their crew with a seaworthy vessel. Negligent orders, having insufficient crew members, and assigning too few crew members to a job all breach this duty. See, e.g., *Drachenberg v. Canal Barge Co.*, 571 F.2d 912, 918 (5th Cir. 1978); *Mascola v. Pacific Coast Transport Co.*, 421 F.2d 1281, 1283 (2d Cir. 1970).

In that case, the plaintiff had not requested assistance in moving heavy objects, which was one of the main bases for the grant of summary judgment. Here, there is a factual issue even under the incorrect state of the facts as to whether assistance

was requested and certainly no competent evidence that replacement of the motor was a one-man job for a short and slight person such as Johnson.

"Members of the crew of a vessel are warranted as seaworthy, and there may be liability for ... negligent orders, or for utilizing an understaffed or ill-trained crew." *Vendetto v. Sonat Offshore Drilling Co.*, 725 So.2d 474, 479 (La. 1999).

In the present case, the plaintiff's motion, supporting memorandum and exhibits in opposition to defendant's motion for summary judgment, clearly demonstrated that there was a factual issue of whether or not the plaintiff was solely at fault for his own injury. At a minimum, even if the court does not deem the vessel unseaworthy, there is the fact that the plaintiff sought assistance and was denied such help by the captain. Therefore, even at the threshold issue of negligence under the facts found by the district court, there were material facts in dispute that render summary judgment inappropriate.

1. Whether or not it should take two grown men to lift a 30-35 lbs. motor is irrelevant to the inquiry.

In no way did plaintiff assert that it takes two "grown men" to "safely" lift 30 to 35 lbs. As discussed above, the accident happened because of the defective adjustment bolt and the necessity that Johnson place himself in a position of peril.

Moreover, plaintiff, Thomas Johnson, is a slight man of below average height and weight for a "grown man." He is a mere 5'8" and weighed approximately 130 lbs. at the time of the accident. Not only is Johnson slight in stature for a "grown man," 5'8' and 130 lbs. is slender for a grown woman. *See*, "Army Height and Weight Standards" attached as Exhibit "1" to the memorandum in support of the motion for reconsideration [R-348], which shows the average weight for a man between 5'8" tall man between the ages of 28-39 is 179 lbs, and

for a woman in the same category 159 lbs. At the time of the accident, plaintiff was below these standard guidelines for both men and women.

Defendant's Exhibit 4(B) [R-151] attached to the memorandum in support of its motion for summary judgment is a picture of a very tall man of imposing stature lifting the motor with one hand. Even he appears to be exerting much effort as evidenced by the protruding forearm muscles, tense neck, and defined bicep as compared with the resting arm in the picture. In that same picture is a much smaller man who appears less physically fit. It is remarkable how much bigger the motor looks when seen juxtaposed against just the shorter man. The shorter man more approximates Johnson's height but significantly outweighs Johnson. Therefore, the picture may have given the district court a false impression of the plaintiff's difficulty in handling the motor without assistance.

In addition, installing the stack fan motor on board a vessel is not standard operating procedure. As the installation of such equipment is routinely done in a shipyard, there is no expectation that the crew members of the vessel are responsible or should be able to lift and install the motor.

2. Defendant's reliance on Thomas v. Diamond Drilling and Vendetto v. Sonat Offshore Drilling, Co. is misplaced:

Negligence is dependant upon the totality of the circumstances. Here Mr. Johnson explicitly requested help, and help was denied by the captain. As such, *Thomas v. Diamond M. Drilling Co.*, 569 F.2d 926, 927 (5th Cir. 1978) is distinguishable on its face. The court notes that in *Thomas* the "plaintiff had the opportunity to ask for assistance and failed to use safety devices." In the present case, granting summary judgment penalizes the plaintiff for knowing his personal limitations and requesting help, i.e. following safety precautions. Plaintiff may have been familiar with the installation of the stack fan motor, however, he was also knew it was beyond his

capability to install it himself without significant difficulty given the fact that the slider on the mounting bracket was frozen because of the defective adjustment bolt.

In the present case, the denial of assistance is itself negligent. Unlike *Vendetto v. Sonat Offshore Drilling Co.*, 725 So.2d 474, 479 (La.1999), where the plaintiff was injured following standard operating procedures, the installation of the motor in this case flies squarely against the defendant's "standard procedure."

Furthermore, defendant's reliance on *Thomas v. Diamond Drilling* and *Vendetto v. Sonat Offshore Drilling Company,* for the proposition that the defendant was not negligent because the task of lifting the 31 lbs motor was reasonable, is misplaced. Primarily, neither of these cases is at the summary judgment stage but decided by a trial on the merits. Moreover, *Thomas v. Diamond,* is distinct in that the employee in that case did **not** ask for assistance. The court also stated in *Thomas* that whether Diamond was negligent or Thomas was negligent for not asking for help, acted as the proximate cause of the injury and is "**peculiarly fact finding**". (emphasis added) *Thomas v. Diamond M. Drilling Co.*, 569 F.2d 926, 927 (5th Cir. 1978). Therefore, the case law cited by defendant also supports the position that summary judgment was improper.

Vendetto is also distinct as it is an instance where the employee had performed the task that resulted in his injury on numerous previous occasions. Not only did the plaintiff in the present case not install such motors routinely, it was not "routine" to install them offshore.

Furthermore, the language in *Vendetto* suggest that the issues of the present case are fact sensitive and were improper for summary judgment: "In a Jones Act case, the court should determine the negligence of the employer according to the

standard of a reasonable employer under like circumstances, and should determine the contributory negligence of the seaman according to the standard of a reasonable seaman under like circumstances."

3. Plaintiff had no "practicable option" but to risk injury and install the motor.

Plaintiff had no practicable option other than to get up on the stack fan tunnel and lift the motor by himself, a feat he knew was unprecedented and risky without assistance. While straddled on the stack fan tunnel, Johnson was injured while lifting the motor in order to try to get the bolts through the slots on the mounting bracket. He was then on top of the stack fan tunnel. It is noted that this "lifting" does not involve the initial bending and stooping to lift the motor, but "lifting" means the period of time in which he was straddled on the stack fan during the installation. This case falls within the theory of a "practicable alternative" as espoused by this court. *See, Dale Toups vs. Marine Transportation Services, Inc.*, 99-2481 (E.D. La. 8/15/00), 2000 U.S. Dist. LEXIS 12033. As in the *Toups* case, the plaintiff in the present case had no practicable alternative but to perform the installation of the motor short of getting fired and losing his job for failure to follow orders. Plaintiff's job prospects were minimal given his limited qualifications, and refusing the captain's order simply was not an option.

"The question of whether a practicable alternative existed presents an issue of fact that precludes summary judgment." *See Dale Toups vs. Marine Transportation Services, Inc.*, 99-2481 (E.D. La. 8/15/00), 2000 U.S. Dist. LEXIS 12033, *12 .

B. Deferral of Summary Judgment Was Warranted as Plaintiff Diligently Sought Discovery Which Was Waylaid by Defense Counsel.

The district court began its analysis with the standard of review which requires the plaintiff to show additional discovery will defeat the summary judgment. The court further quotes

authority that if the non-moving party had not diligently pursued discovery, the court need not accommodate the non-moving party's request. Certainly, the evidence and documents of plaintiff evidence that plaintiff has persistently requested additional discovery and has been dragged through a game of "hide the ball." Plaintiff relied on the professionalism and reputation of opposing counsel's law firm and refrained from needlessly burdening the court with extraneous motions to compel based on plaintiff's counsel's years of favorable experiences with defense counsel's firm. The code of professional conduct encourages attorneys to settle disputes and discovery issues among themselves before seeking court intervention.

Plaintiff had grave concerns when his repeated attempts to schedule depositions of employees and former employees of Lawson & Lawson were waylaid by opposing counsel given the looming trial date and fact that plaintiff's counsel, Mr. Koerner, was out of the country for the month of June. Immediately upon Mr. Koerner's return, he requested a discovery conference with Mr. Delos Flint of Fowler, Rodriquez, defendant's counsel, which was held on July 1, 2001.

As shown in the various affidavits, the depositions of Ernie Hunt, the Chief Engineer of the Henry B, and the crew members are material to this dispute. Plaintiff has diligently attempted to contact Mr. Hunt, through his employer via defendant's counsel and independently, to schedule the deposition of Hunt and other crewman with defendant to no avail. Defense counsel finally gave plaintiff a non-false lead on Mr. Hunt's just days before the district court rendered its summary judgment.

Therefore, since the evidence demonstrates plaintiff's "due diligence" in securing this discovery[64] and the fact that the parties had mutually agreed to continue discovery prior to the rendering of summary judgment, arguably a deferment or reconsideration should have been viewed as a mandatory remedial measure. *See*, *Herb's Machine Shop, Inc. v. The John Mecom Co.*, 426 So.2d 762 (La.App. 3 Cir. 1983) (discusses the issue in the context of a continuance pursuant to La.Code Civ.P. art. 1602).

C. What is the Rule in the Fifth Circuit as to Consideration of Affidavits Subsequent to Deposition Testimony?

In *Tippens v. The Celotex Corporation*, 805 F.2d 949, 952-53 (11th Cir. 1986) (reversing summary judgment despite evidentiary discrepancies), Judge John R. Brown characterized the situation facing this Court:

> Summary judgment is such a lethal weapon, depriving a litigant of a trial on the issue, caution must be used to ensure only those cases devoid of any need for factual determinations are disposed of by summary judgment.

He also discussed the Sham Affidavit Concept and agreed that an affidavit could be disregarded if it were a sham. However, he stated at pp. 953-54:

> A definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence. "An opposing party's affidavit should be considered although it differs from or varies (from) his evidence as given by deposition or another af-

---

[64] *See*, Motion of Plaintiff, Thomas Johnson, for Expedited Hearing on Motion to Defer Consideration of Motion for Summary Judgment, Supporting Memorandum and Exhibits incorporated herein by reference.

fidavit and the two in conjunction may disclose an issue of credibility." 6 Moore's Federal Practice para. 56.15 (4) (2d ed. 1985) (footnote omitted).

The purpose of summary judgment is to separate real, genuine issues from those which are formal or pretended. To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness (in this case, the affiant) was stating the truth. Variations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all. Issues concerning the credibility of witnesses and weight of the evidence are questions of fact which require resolution by the trier of fact. An affidavit may only be disregarded as a sham "when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact . . . (and that party attempts) thereafter (to) create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins* at 657.

Every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence. See *Choudhry v. Jenkins,* 559 F.2d 1085, 1090 (7th Cir.) (summary judgment was improper even though party's testimony was "not a paradigm of cogency or persuasiveness," since it was not a "transparent sham"), cert. denied sub nom., *Indiana v.*

> *Choudhry*, 434 U.S. 997, 98 S. Ct. 634, 54 L. Ed. 2d 491 (1977). In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an early deposition.

Kennett-Murray Corp. v. Bone, 622 F.2d 887, 894 (5th Cir.1980). n6

In *Kennett-Murray,* 622 F.2d at 894-95, the leading Fifth Circuit case, the district court had disregarded a conflicting affidavit and had granted summary judgment. The Fifth Circuit, using the test quoted *supra*, analyzed the affidavit, as follows:

> Even assuming that the deposition was unequivocal, Bone's affidavit served to create a genuine issue which would preclude summary judgment. Bone's affidavit did not purport to raise a new matter, but rather to explain certain aspects of his deposition testimony. Bone stated that he was confused during the deposition and at one point thought that the questioning concerned the promissory note whereas in fact it related to the signing of the employment contract. Bone's assertion is at least plausible. A fair reading of the deposition reveals frequent shifts in the questioning between the promissory note and the employment contract with a degree of confusion on the parts of both Bone and the attorneys.
>
> The affidavit is not inherently inconsistent with Bone's earlier testimony. Obviously, Bone's answer that Speights said nothing cannot be taken literally. Certainly, one would expect two business associates meeting to sign important documents to exchange some words. Bone may simply have meant that Speights did not affirmatively state anything about the specific content of either document. Such a view would not necessarily foreclose the possibility that Speights made some general remark that the contract was like the earlier ver-

sion. Furthermore, the statement in the affidavit is not at odds with Bone's general theory of defense presented in the deposition. Throughout the deposition, Bone made reference to the fact that he believed that he was signing the same contract as before, and that Kennett-Murray somehow "switched" contracts on him. The statement in the affidavit is in accord with that view and cannot be said to constitute a reformulation of Bone's general defense.

In light of the fact that the affidavit is generally consistent with the position forwarded in the deposition, the concerns raised in *Perma Research* and *Radobenko* are not present in this case. Accordingly, we do not decide whether the principles enunciated in those cases should be adopted by this court. While some statements in Bone's deposition differ with those in his affidavit, these conflicts present questions of credibility which require jury resolution. Accordingly, the grant of summary judgment is reversed.

In *Dibidale of Louisiana, Inc. v. American Bank & Trust Company*, 916 F.2d 300, 307-308 (5th Cir. 1990), Popich submitted an affidavit that seemed to vary his deposition testimony. The district court gave it no weight and rendered summary judgment. The Fifth Circuit reversed:

> In reviewing a motion for summary judgment the court must consider all of the evidence before it, including affidavits that conflict with deposition testimony. A genuine issue of material fact may be raised by such an affidavit "even if it conflicts with earlier testimony in the party's deposition." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893 (5th Cir.1980) (citing 6 Moore's Federal Practice para. 56-15[4] at 56-522 (2d Ed.)). Nor, for that

matter, is Popich's affidavit necessarily inconsistent with his deposition testimony. Read in the light most favorable to Dibidale as the non-movant, both documents assert that American Bank succeeded in making clear its intentions without flagrantly violating the law. n5 To the extent they exist, discrepancies in those averments present credibility issues properly put to the trier-of-fact. *Kennett-Murray, 622 F.2d at 894.* Credibility assessments are not fit grist for the summary judgment mill. Dibidale's evidence, both direct and circumstantial, including the fact that American Bank approved the loan one day after Dibidale hired Theriot, renders summary judgment inappropriate herein. We do not now resolve this genuine issue of material fact; that remains for the trier-of-fact.

In *Savant v. Pennzoil Company*, 1993 U.S. Dist. LEXIS 12808 (EDLA 1993), Judge Clement was faced with a remarkably similar situation in which the plaintiff's own testimony was ambiguous but was explained by a subsequent affidavit of the plaintiff and of an expert, Kenneth Kaigler. In refusing to grant summary judgment, the court stated:

> Pennzoil contends the position now taken by the plaintiff is inconsistent with his original theory of the case espoused throughout both days of his deposition and in his original complaint. However, *Kennett-Murray, supra,* and *Albertson, supra,* contemplate a clear contradiction between a party's deposition testimony and that same party's affidavit. Plaintiff has submitted an affidavit by an expert witness, Kenneth Kaigler, which states:
>
> the DX plug blew up the hole due to a pressure differential in Pennzoil's Dual Completion well caused by either a bleeding off of pressure above the DX plug or a valve leakage in either string or the annulus.

> Pennzoil submits deposition testimony in which plaintiff states there was no valve leak, as well as affidavits of Pennzoil employees stating they did not bleed off the pressure in the pipes during the wireline operations. Pennzoil urges this Court to grant summary judgment on the basis that plaintiff has failed to establish the existence of an element essential to his claim for negligence on which plaintiff bears the burden of proof, citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). However, Celotex requires the plaintiff "go beyond the pleadings and by [his] own affidavits" show "there is a genuine issue for trial." Id. Plaintiff has done so by submitting the affidavit of Kenneth Kaigler, thus creating a genuine issue of material fact which precludes summary judgment.

See also, *Mahan v. Boston Water and Sewer Commission*, 179 F.R.D. 49, 52-53 (D. Mass. 1998) (same test used in rejecting summary judgment); *Lowery v. AIRCO, Inc.*, 725 F.Supp. 82, 86 (D. Mass 1989) (no real conflict after analysis); *Rekieta, v. K-MART Corporation*, 1998 U.S. Dist. LEXIS 110, *14 (ND Tex. 1998) (denying a motion to strike the subsequent affidavit and denying summary judgment); *Gilbert v. Texas Mental Health and Mental Retardation*, 919 F.Supp. 1031, 1037 (ED Tex. 1996) (overruling defendants' objections to subsequent affidavits).

SHOULD PLAINTIFF HAVE MADE THE CUT?

The plaintiff testified that he hurt himself when he was lifting up the motor to put the bolts through it. (Deposition of Thomas Johnson, page 75, lines 13-19). This was not done and could not be done in connection with the initial lifting of the motor, but had to be done when plaintiff was in a crouched position on top of the stack fan motor. (Affidavit of Thomas

Johnson dated July 23, 2001, ¶ 7, R-356). At that point, Johnson had to lift the motor again in order to line it up against the bolts that were frozen in place because of a defective adjustment bolt, which, as can be seen very clearly in the pictures, *supra*,[65] could not be adjusted so as to permit the motor to be rested on the stack fan and then have the slider adjusted so that the bolts could be inserted in the slider. (Affidavit of Thomas Johnson dated July 23, 2001, ¶ 8, R-356).

This is also not inconsistent with the answers to interrogatories.

Although it is difficult to demonstrate actions through words, even with pictures, the following is the sequence of events that occurred.

1. Many weeks prior to the date of the accident, Johnson removed the stack fan motor from the stack fan and advised the then chief engineer, Roy Chestnut, of the problems with the adjustment bolt.[66] Chestnut, whose testimony has been sought, can testify as to this.

2. On the day of the accident, plaintiff, knowing of the problem, asked for help but was denied it. (Deposition of Thomas Johnson, p. 61, l. 1-8). Ernie Hunt would know of this, and would also know of the circumstances after the accident and the antagonism of the captain.

3. Having been denied help, the plaintiff attempted to install the motor himself. After uneventfully lifting up the motor but being unsuccessful in installing it, plaintiff placed it on top of the stack fan housing. He then got up on the stack fan housing, putting his feet on the stack fan housing in the places indi-

---

[65] 8 by 10 pictures of the defective bolt and mounting bracket are in the record at R287-288.

[66] Escheté affidavit ¶ 7, R-353.

cated in the picture at p. 8 of the reconsideration memorandum. (Affidavit of Thomas Johnson dated July 23, 2001, ¶ 8, R-356).

4. Inasmuch and the adjustment bolt was defective and stuck, Johnson then tried to place the bolts from the motor into the mount (which was frozen into place an operating position) because the slider mechanism could not be adjusted. (Affidavit of Thomas Johnson dated July 23, 2001, ¶ 6, R-356).

5. Had the adjustment bolt been working and the slider been able to be adjusted, Johnson could have lowered the slider so that the motor could have been pushed into the mount while the motor was resting on the stack fan housing. (Affidavit of Thomas Johnson dated July 23, 2001, ¶ 9, R-357).

6. Since the adjustment bolt and the slider were not working, Johnson had to reach around and hold the stack fan motor at a position elevated from the stack fan housing in order to place the bolts into the frozen mount and place nuts on them. (Affidavit of Thomas Johnson dated July 23, 2001, ¶ 8, R-356).

7. In order to raise and lower the motor sufficient to permit the bolts to fit inside the hole in the mount, plaintiff had to use his foot to steady and lift the motor. This is the point at which the plaintiff felt pain. (Affidavit of Thomas Johnson dated July 23, 2001, ¶ 10, R-357).

8. As Hunt was present on board the Henry B during and after the accident, he would presumably be able to corroborate plaintiff's story as clarified.

The foregoing and the affidavits on which it is based makes it clear that plaintiff explained and clarified the **one** answer in this deposition that was relied upon by the defendant, not correctly opposed, and then accepted by the district court. The district court should have exercised her discretion in order to at least consider this, but did not do so.

DID THE DISTRICT COURT ABUSE ITS DISCRETION BY REFUSING TO AT LEAST CONFRONT THE ADDITIONAL MATERIAL SUBMITTED ON RECONSIDERATION?

The district court states that plaintiff failed to offer arguments or evidence that merit reconsideration and that the plaintiff's counsel provided an affidavit where he merely reiterates some of the very arguments that the court considered and rejected in its original ruling.

A review, however, of the affidavits and the memorandum in support of reconsideration demonstrates that there were totally new arguments, which is *ipso facto* obvious since the original opposition was based on a misunderstanding of the true facts. The district court was required to consider judicially the record at the time of the motion for reconsideration not just as it existed as the time of the initial ruling. *Xerox*, 888 F.2d at 349 (5th Cir. 1989). If the evidence warrants it, the district court is "obliged to reconsider and rescind the interlocutory summary judgment order. Failure to do so constituted an abuse of discretion." *Xerox*, 888 F.2d at 356. The affidavits were just the type of additional evidence that has been considered in deciding whether or not to grant summary judgment. *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir.1980); *Savant v. Pennzoil Company*, 1993 U.S. Dist. LEXIS 12808 (EDLA 1993).

Here, the affidavits demonstrate the liability of Lawson and the unseaworthiness of the vessel. They then explained the ambiguity in plaintiff's deposition and did not contradict it.

As the district court noted in its reasons for granting summary judgment, proof of negligence is essential to recovery. The employer has to use reasonable care and to provide a seaman with a safe place to work. Here, there was a dangerous condition on the vessel. Particularly in the situation of Jones Act cases, which require only "slight" evidence to meet the

burden of proving the causation prong of liability determination, and recovery will be barred only if the seaman's own negligence was the sole cause of the injuries. *Domonter,* 761 So.2d at 634-35.

It is undisputed Johnson requested help. The help was refused. Moreover, the adjustment bolt was defective, so that the motor could not just be lifted up to the top of the stack fan and installed, and the installation was much more complicated and dangerous.

The district court stated that the plaintiff must present newly discovered or previously unavailable evidence, must show that the motion is necessary in order to prevent manifest injustice or that motion justified by an intervening change in the controlling law. Although she concluded that the plaintiff did not do so, this was a failure to exercise discretion or an abuse of discretion, because the evidence on reconsideration was vivid and compelling.

CONCLUSION

Lawyers are not supposed to be able to lose client's cases because of events outside of the control of and not the fault of the client. *In re Christopher*, 35 F.3d 232, 236 (5th Cir. 1994), citing *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380; 113 S. Ct. 1489; 123 L. Ed. 2d 74 (1993). Without relief from this Court, this may well happen in this case.

Factors such as the recalcitrance of the defendant to provide discovery and the foreign travel schedule of plaintiff's counsel combined to put the plaintiff at such a terrible disadvantage in this case that it will, without the intervention of this Court, result in a final judgment of dismissal of a facially valid claim.

Such a result is antithetical to our sense of justice and the basic fairness with which the Courts of the United States temper the justice that is therein meted out. This summary judgment in this case should be reversed, and the case remanded for trial after completion of discovery.

APPENDIX I – THE AFFIDAVIT OF LOUIS R. KOERNER, JR. FILED ON DECEMBER 31, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 01-31122
THOMAS E. JOHNSON
Plaintiff-Appellant
VERSUS
LAWSON & LAWSON TOWING COMPANY, INC.
Defendants-Appellee

AFFIDAVIT OF LOUIS R. KOERNER, JR. IN SUPPORT OF THE MOTION OF THOMAS E. JOHNSON, PLAINTIFF AND APPELLANT, FOR PANEL AND EN BANC RECONSIDERATION OF DENIAL OF MOTION TO REINSTATE THE APPEAL AND TO FILE BRIEF AND RECORD EXCEPTS INSTANTER AND OUT OF TIME AND FOR STAY OF THE MANDATE

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, on this 31st day of December, 2001, personally came and appeared Louis R. Koerner, Jr., who being duly sworn, did depose and say that the following is true and correct:

1. He is appellate counsel for Thomas E. Johnson, plaintiff and appellant, mover in the motion to this Court for *en banc* reconsideration of his motion to reinstate the appeal in this matter and to file the brief and the record excepts instanter and out of time.

2. The Clerk of this Court dismissed this appeal on November 14, 2001 for failure to file record excerpts and briefs in

this matter. There had been no prior motion by appellee under FRAP 31(c).

3. On November 26, 2001, the briefs and record excerpts were filed together with a motion to file the same out of time and to reinstate the appeal. To the best of the understanding of affiant, the brief and record excerpts were completely in conformity with the Federal Rules of Civil Procedure and the Rules and Internal Operating Procedures of this Court. This Court's docket sheet entry of November 26, 2001 indicates that the default was remedied.

4. The motion was decided and denied by a single judge of this Court on December 19, 2001, received December 20, 2001.

5. Upon my return from vacation on June 30, 2001, I found that my sight had deteriorated materially on account of previously diagnosed cataracts in each eye. This made preparing the opposition to the motion for summary judgment in the district court difficult and challenging Although with the help of my doctor of optometry at Ochsner Clinic, I changed the power of my corrective lenses and secured glasses, it became obvious, when I was examined for an eye infection, that I had to have cataract surgery in both eyes, and that I could not longer safely drive.

6. As a consequence of my inability to drive or to see well, a trial in New Iberia was continued on August 20, 2001 as well as a motion set on August 14, 2001.

7. My first successful cataract surgery, on my right eye, was on August 27, 2001. After that, my distance vision in that eye began to improve, although I had great difficulty in reading either with that eye or with my left eye. I therefore delegated most of the reading duties in my office to my staff.

8. My second successful cataract surgery, on my left eye was on October 22, 2001. However, reading continued to be difficult until some time in November when my reading eye-

sight basically was returned to normal. Throughout that period of time, I was unwilling and unable to drive substantial distances.

9. As may be seen from the Incoming Mail Lists for September 27-28, 2001 attached to the original motion, the appearance form and docketing form were received but not properly noted either on the Mail List or on the calendar. The briefing notice was dated September 26, 2001, less than two weeks after the denial of reconsideration and the filing of the notice of appeal, so that I was not put on notice of the beginning of the briefing period by the lapse of a reasonable period of time.

10. Although I was able to read on September 27-28, 2001, my reading vision was greatly blurred, and I was unable to read well but only with great difficulty and with many mistakes. I did not see the briefing notice, and it was not otherwise brought to my attention by the temporary staff which was handling the mail list since Lesley St. Germain, who was my office manager and responsible for the calendar, had been in a serious automobile accident and was on a restricted schedule. As I have a large computer monitor and able to magnify characters, I was able to read the computer screen better than printed material.

11. As may be seen from the attached copies of the e-mail from this Court and my reply, I had received (10/12/01) and signed up (10/13/01) for the Fifth Circuit's Event Notification System, and expected to receive my briefing notice in the captioned case electronically. However, inasmuch as a paper briefing notice had already been sent, no electronic briefing notice was received.

12. Affiant is experienced counsel in this Court, having been a member of the Bar of this Court for over thirty (30) years. I have filed scores of briefs on a timely basis and have

always sought an extension if required. To the best of my recollection, there has never been a case in which an appeal has been dismissed, even temporarily, for failing to timely file a brief.

13. As is noted on the docket sheet, the record on appeal was released to counsel for mover on October 23, 2001. This was because a member of the clerk's office called Lesley St. Germain and stated that the record was ready. This started counsel's internal clock for the 40 day briefing period, since he had not previously actually seen the briefing notice and there was no calendar entry as is the practice in his office. I immediately assigned the initial preparation of the brief to Genvienve Jacques, a recent graduate of Loyola Law School. Unfortunately, she did not discover that the briefing notice had already been issued, and left within two weeks with no work done on the brief.

14. My first notice that a brief was due or had not been timely filed was on November 15, 2001, when the dismissal of the appeal was filed.

15. A review of the brief and record excepts as filed demonstrates that the appeal was filed in good faith and is worthy of consideration on the merits. Moreover, the appellant, Thomas Johnson, was not responsible in any way for the calendaring error in the office of his counsel.

16. The opposition filed by appellee, Lawson & Lawson, does not state that there has been prejudice to Lawson & Lawson, and affidavit knows otherwise of no such prejudice.

SWORN TO AND SUBSCRIBED /s/_____
BEFORE ME ON THIS 31ST DAY Louis R. Koerner, Jr.
OF DECEMBER, 2001.

/s/_____
NOTARY PUBLIC